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JAMES H. Mc
Brief of Wickersham, Daniels &
Webster for Appellees.

IN THE

Supreme Court of the United States.

Filed April 22, 1898.

October Term, 1897. No. 231.

E. H. HUBBARD, ASSIGNEE OF THE UNION LOAN AND TRUST COMPANY,

Appellant,

vs.

. KENNEDY TOD, WILLIAM STEWART TOD AND ROBERT E. TOD,

Appellees.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEES.

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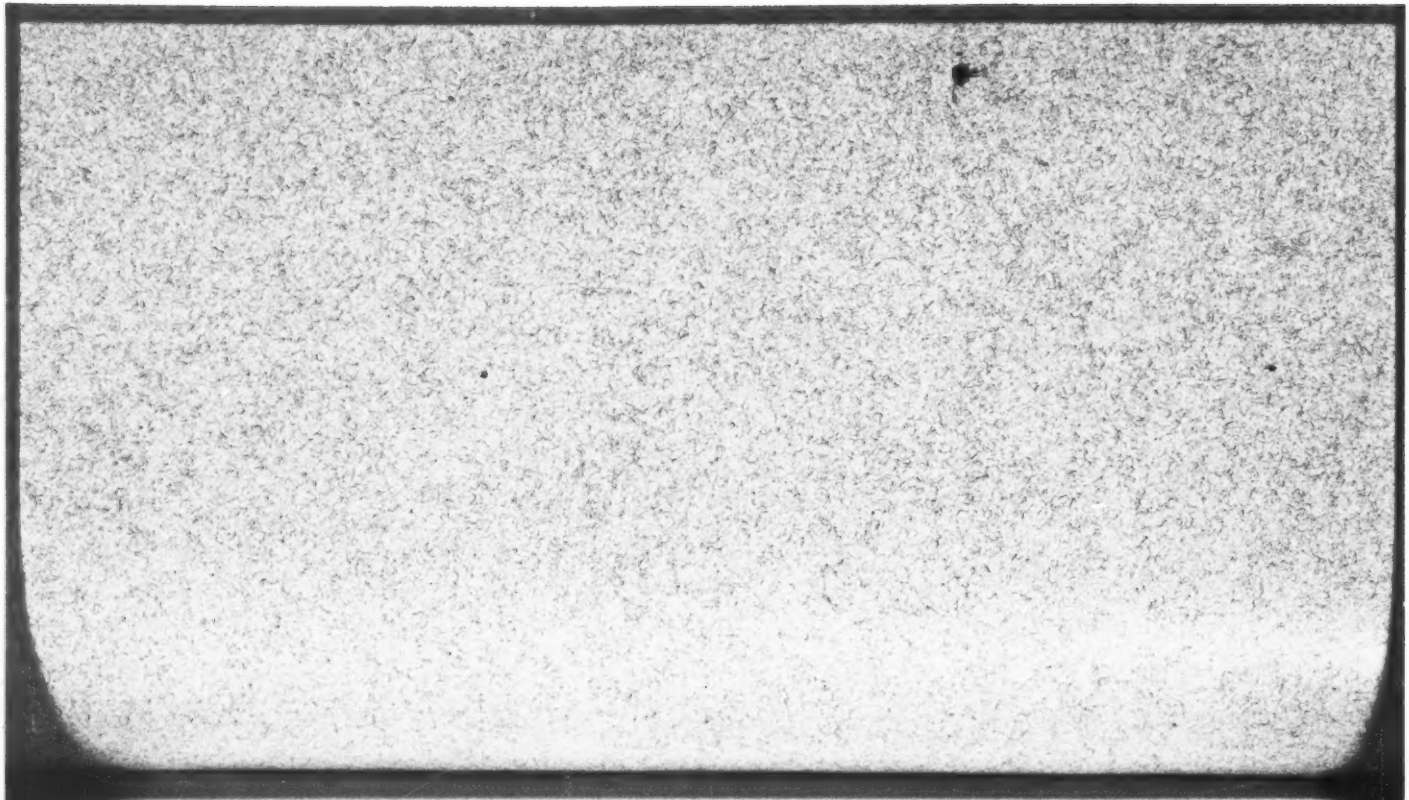

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1897.

E. H. HUBBARD, Assignee of the Union Loan and Trust Company,
Appellant,

vs.

J. KENNEDY TOD, WILLIAM STEWART TOD and ROBERT E. TOD,
Appellees.

No. 231.

On Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR APPELLEES.

This case comes on to be heard upon a return made by the Circuit Court of Appeals for the Eighth Circuit to a writ of *certiorari* granted by this Court at the last term, under Section 6 of the Act of Congress of 1891. The petitioner for the writ was an intervenor in the Circuit Court, and appellant to the Court of Appeals.

The decree of the Circuit Court of Appeals which he seeks to have reviewed affirmed a decree of the United States Circuit Court for the Northern District of Iowa, which granted him the right to redeem certain securities now in the hands of the ap-

pellees, upon the payment of $1,500,000 advanced upon them, and for the repayment of which they had been specifically pledged, with interest.

The controversy arose upon a petition of intervention filed in a suit brought for the appointment of a Receiver of the Sioux City and Northern Railroad, by E. H. Hubbard, a voluntary general assignee of the Union Loan and Trust Company, for the benefit of its creditors, against the members of the firm of J. Kennedy Tod & Co., well known bankers of New York City. The petition asserted a paramount right to 10,600 shares of the stock of the said Sioux City and Northern Railroad Company, and an issue of first mortgage bonds of the Sioux City, O'Neill and Western Railrond Company, in the hands of the defendants, upon the ground that such stock and bonds had been first pledged with the said Union Loan and Trust Company to indemnify it against liability upon its indorsement of certain notes known as "Railroad Syndicate" paper, and had been wrongfully rehypothecated to the defendants. This "Railroad Syndicate" paper is held by some 340 banks scattered through the country, for whose benefit the present proceeding was brought and is now being prosecuted. The notes contained no reference to any collateral or security for their payment, and were purchased *without any inquiry by any of the banks as to whether or not the Union Loan and Trust Company was secured for its endorsement.* On the other hand, J. Kennedy Tod & Co. hold the securities in trust for the holders of notes of the Pacific Short Line Bridge Company, endorsed by A. S. Garretson, in sums of $5,000 each and aggregating in all the sum of $1,500,000, which notes *on their face purport to be secured by, and which were negotiated and sold upon the faith of the deposit with said firm, in pledge to secure their payment,* of 10,600 shares of the capital stock of the Sioux City and Northern Railroad Company, and $2,340,000 of the first mortgage 6 per cent. bonds of the Sioux City, O'Neill and Western Railway Company.

The Circuit Court held that the Union Loan and Trust Company had at one time had some kind of a lien or equity in the securities, but that it had voluntarily consented to the pledge thereof to the defendants, thereby subordinating its claim to theirs, but that the assignee might redeem upon paying the $1,500,000 secured by the pledge to defendants, with interest. This decision was affirmed by the Circuit Court of Appeals.

The question at issue therefore is whether the banks who never heard of the securities in controversy before the failure of the Union Loan and Trust Company shall have them; or the note holders who parted with a million and a half of dollars on faith of the deposit of the securities in pledge with their trustee.

The Pleadings.

The INTERVENING PETITION, filed October 5, 1893, alleged (pp. 46-62) among other things, that A. S. Garretson, of Sioux City, who was Vice-President of the said Union Loan and Trust Company, had associated with himself D. T. Hedges, John Hornick, Ed. Haakinson and James E. Booge, under the name of "the Railroad Syndicate," in certain railroad enterprises to be carried on by them, with the plan and purpose to procure notes to be made or furnished by members of the said syndicate, to be discounted by and through the Union Loan and Trust Company, the proceeds to be credited on the books thereof to John Hornick, Trustee, and expended in the construction and acquisition of railroad properties, which properties and the representation of title or interest therein were, in the understanding and agreement of the Syndicate and the Trust Company, to remain as collateral security for the payment of the notes to be discounted and negotiated as aforesaid. That pursuant to said plan the said Syndicate made notes, which were discounted through the Union

Loan & Trust Company, and the proceeds whereof were expended in the construction and equipment of the Sioux City & Northern Railroad; and that the stock of the said Company was substantially all of it held in the possession of the Union Loan & Trust Company as collateral security "*for the payment of the notes* WITH *the proceeds whereof the said railroad had been constructed and equipped, as aforesaid.*"

That the said Railroad Syndicate also acquired the Sioux City, O'Neill & Western Railroad, and caused it to issue its bonds and its stock, all of which *stock* was at the time of the assignment by the Trust Company to the petitioner in the hands of the Trust Company as security for the Railroad Syndicate paper. That in the latter part of 1892 or early in 1893 the said A. S. Garretson, *without any apparent record or other authority* from the said Trust Company, caused all of the bonds of the Sioux City, O'Neill & Western Railway Company, and substantially all of the stock of the Sioux City & Northern Railroad Company to be vested in the Pacific Short Line Bridge Company, and the notes of the latter company to be given to himself, to the amount of $1,500,000, and the payment thereof to be secured by a pledge of all said bonds and stock, and transferred the said notes, together with the said security for the payment thereof, to J. Kennedy Tod & Company, who, acting as trustees, negotiated or bought the greater part of the said $1,500,000 notes for different holders or purchasers thereof, $500,000 thereof being taken by the Great Northern Railway.

That after the failure of the Union Loan & Trust Company, a committee of its creditors was appointed, who, by means of promises to endeavor to raise money to pay overdue interest on said loan, persuaded J. Kennedy Tod & Company to postpone a sale, which had been advertised, of the collateral to the said loan, pursuant to the provisions thereof (interest thereon due July 1, 1893 not having been

paid, and default therein having continued for thirty days), and having raised the necessary money, went to the office of the said firm the day before the sale and offered to pay the overdue interest upon certain conditions which were refused, and thereupon the said collateral was sold and bought in by the said J. Kennedy Tod & Company, for $1,000,000.

That the said Tod & Company had had such actual or implied notice of want of title or authority in said Garretson to transfer or pledge the said collateral as security, as to put them upon inquiry in respect thereof, which inquiry would have disclosed Garretson's want of right or title to pledge the same, and that a superior and better title to said securities was vested in the said Union Loan & Trust Company, to protect it from loss by reason of its endorsement of said Railroad Syndicate paper, and to secure the payment thereof; and the said petition thereupon prayed (pp. 60-61): *First.*—An injunction to restrain Tod & Company from selling or disposing of the securities until the petitioner's claim was determined. *Second.*—An accounting of what sums Tod & Company had advanced in good faith, &c., for account of said securities. *Third.*—The surrender by Tod & Company of the said collaterals to the Intervenor, *upon the accounting and ascertainment of the sum so advanced which constituted a lien upon the said collaterals; and Fourth.*—A receivership of the Sioux City & Northern Railroad Company.

Prayer of Intervening Petition.

The ANSWER of J. Kennedy Tod *et al.* filed November 16, 1893 (p. 74), traversed the allegations in the petition upon which the claim to a lien upon the securities was based, and affirmatively showed that the said defendants, as trustees, under a certain agreement with A. S. Garretson, dated December 31, 1892, had held the shares of stock of the Sioux City & Northern Railroad, and the bonds of the Sioux City, O'Neill & Western Railway Company referred to in the invervening petition, as collateral security for the payment of three

Answer.

hundred promissory notes of the Pacific Short Line Bridge Company, endorsed by A. S. Garretson, in the sum of $5,000 each, which notes had been sold to divers and sundry parties, who had purchased the same for value, without notice of any defect, &c., and upon the faith of the said securities. That default had been made in the payment of interest due upon the said notes on July 1, 1894; that the collateral had been sold out pursuant to the terms of the said agreement, and purchased by the said Tod & Company, as purchasing trustees for the note holders, and who now held the same free and clear of all claim or interest by or on behalf of the pledgors, or any other parties than the note holders; and also alleging that even if the Union Loan & Trust Company had had any interest in the securities in question, it was estopped to assert the same by the acts of its officers and directors in suffering the securities to remain in such form that defendants were led to believe their pledgors had title and ownership thereof, and to take said pledge and sell said notes in reliance upon such apparent ownership and without any knowledge or notice to the contrary.

Amended Intervening Petition.

On or about January 1, 1894, the intervenor, by leave of the Court, obtained *ex parte*, filed an elaborately AMENDED PETITION (pp. 128–164) in which, in addition to the allegations of the original petition, it was averred that the railroad syndicate therein referred to had acquired the ownership of all of the bonds of the Nebraska and Western Railway Company, and that the said bonds had become subject to the alleged lien of the Union Loan & Trust Company, that the said bonds, and the mortgage covering the same, were foreclosed, and the property conveyed to a new corporation known as the Sioux City, O'Neill & Western Railway Company in exchange for the issue of $2,340,000 of First Mortgage bonds and 36,000 shares of stock, and that the said Garretson, on or about October 1, 1891, without any apparent or other authority from the said Union

Loan & Trust Company, had caused all of said Nebraska & Western bonds and 7,200 shares of Sioux City & Northern stock to be transferred to Tod & Company as security for a loan of one million dollars. That during said ostensible pledge, the foreclosure of the Nebraska & Western Railroad took place, and that afterwards, at a time when the said Nebraska & Western bonds *were* and the said Sioux City & Northern stock *should have been*, and a part of said stock *was* in the hands and possession of the said Union Loan & Trust Company as collateral security for the payment of railroad syndicate paper, the said Garretson, without any apparent record or other authority from the said Trust Company, purported to cause the title to the said bonds and the greater part of the said stock to be ostensibly transferred to the Pacific Short Line Bridge Company, and the notes of that company to be given to himself to the amount of $1,500,000, and the payment thereof to be ostensibly secured by the repledge as the property of the said Bridge Company of all said bonds as collateral for the payment of said notes, which he purported to transfer to said Tod & Company. That Tod & Company were put upon inquiry in respect of Garretson's title and interest in the premises, because of the circumstances of certain other transactions between them, out of which the said pledge arose. Such circumstances, were that the Nebraska and Western Rail way was built under contract by the Wyoming and Pacific Improvement Company, which was practically owned and controlled by the Manhattan Trust Company, one of the directors of which was a member of the firm of Tod & Company. That the Improvement Company received stock and bonds of the Nebraska and Western Company, and delivered the same to the Manhattan Trust Company, by which the same were either pledged or held in trust as security for loans negotiated and advanced by it to the said Improvement Company, including a loan of $500,000 to August Belmont & Company, and other

like obligations to the amount of one million dollars more, all of which were outstanding when on November 1, 1890, the enterprise of the said Improvement Company collapsed, involving the stability of the Trust Company, all of which was known by Tod & Company. That to relieve itself from impending loss, the said Trust Company by untruthful representations as to the amount of the indebtedness of the said Nebraska and Western Railway Company, induced said Garretson to purchase the said loans, and said Garretson thereupon deposited $750,000 of the Sioux City and Northern bonds with the Manhattan Trust Company as security for the relief of the said maturing obligations to August Belmont & Company, and that about the same time Tod & Company, with knowledge of the alleged facts began to make advances to Garretson on the securities of the Nebraska and Western bonds purchased by him out of the proceeds of the Railroad Syndicate notes, as aforesaid, and that afterwards Garretson continued purchasing said Nebraska and Western bonds with the proceeds of the said Railroad Syndicate paper, which acts obliged Garretson to sell the Sioux City and Northern bonds at a sacrifice price of seventy-five per cent., and further to pledge all the Nebraska and Western bonds and half of the Sioux City and Northern stock substantially for the balance of the purchase price of the Nebraska and Western bonds. That Tod & Company were allied with the Great Northern Railroad Company, which, as the said petition in substance alleged, desired to acquire the Sioux City and Northern Railroad, and therefore assisted in the transactions in a manner set forth in said amendments.

The prayer of the said amended petition (pp. 162-3) was:

Prayer of Amended Intervening Petition.

First.—That Tod & Company surrender to the petitioner, *without any terms or conditions*, the collateral held by them as aforesaid, and that they be enjoined from selling or disposing of the same, *pendente lite*.

Second.—For an accounting of sums advanced by Tod & Company in good faith and without notice on account of the securities, and the disposition made by them of any other collateral held by them under the loan agreement of December 31, 1892.

Third.—The surrender of the said certificates to the petitioner upon an accounting, and the ascertainment of what sums, if any, constituted a lien thereon.

Fourth. - The appointment of a receiver, *pendente lite.*

Supplemental Answer.

On February 3, 1894, the defendants filed their SUPPLEMENTAL or AMENDED ANSWER to the portions of the said amended petition which were not covered by their previous answer (p. 186), denying such of the allegations in the amended petition as tended to show a prior lien upon the securities in favor of the petitioner, or notice to the defendants of any interest of the Union Loan and Trust Company therein, and on February 28, 1894, the Intervenor filed a REPLICATION thereto (p. 198).

Replication

On May 22, 1894, an order was made allowing the petitioner until August 15, 1894, to take his direct evidence, the defendants to have forty-five days thereafter in which to take theirs, and the intervenor fifteen days thereafter in which to take his evidence in rebuttal (p. 379).

Motion to Further Amend Petition.

Testimony having been taken under this order, on September 3, 1894, *after his time to take his direct evidence had expired*, the intervenor filed a motion for leave *to further* amend his petition of intervention (p. 230), which motion was held over until the hearing of the cause on the merits before Judge Shiras, at Dubuque, on November 26–30, 1894, when the same was submitted with affidavits in support of and in opposition thereto. The case proceeded to hearing on the merits, and was submitted, and after filing an elaborate opinion, in which no mention was

made of the second amended petition, on January 15, 1895, the Court embodied in its final decree a provision granting the motion and allowing the second amended petition to be filed (p. 385), although no answer, demurrer or other pleading in response thereto had been filed by the defendants, and the case had been taken as submitted, and finally adjudicated by the Court.

This second amended petition is set forth in the transcript at pages 282 to 378. The proposed amendments alone fill forty-eight printed pages, viz., pages 234 to 282. The petition as amended fills fifty-six printed pages, without any exhibits (pp. 282-338), and the exhibits forty pages more (pp. 338-378).

It is impossible to summarize this document; it contains a curious jumble of pleading, evidence and innuendo; it is in many parts scandulous and impertinent, and in part wholly unintelligible.

It prayed:

Second Amended Petition—Prayer of.

FIRST.—The peremptory surrender to the petitioner of the Sioux City and Northern stock, and the Sioux City, O'Neill and Western bonds, without any terms or conditions whatever, or as the petitioner's rights might appear, with injunction, accounting, receivership, &c.

SECOND.—That the Manhattan Trust Company be made a defendant to the petition of intervention.

THIRD.—That all proceedings under the bill of complaint to foreclose the Sioux City and Northern R. R. mortgage be stayed until the Receiver should be able to pay interest, accrued or to accrue, on the bonds outstanding, out of the earnings, and until the title to the bonds and stock of the Sioux City and Northern Railroad be determined.

FOURTH.—That the notes given by A. S. Garretson, October 1, 1891, to the amount of one million

dollars (which were paid off in January, 1893), and all contracts, &c., relating thereto, be adjudged usurious and void.

FIFTH.—That the $1,500,000 of notes of the Pacific Short Line Bridge Company, and all contracts, &c., relating thereto, be adjudged usurious and void, and that the securities pledged to Tod & Company, as trustees, to secure the payment of said notes, be surrendered to the petitioner, free and clear of any claim, right or interest or lien of the defendants.

SIXTH.—That the petitioner have personal judgment against Manhattan Trust Company for $1,250,000, being the amount alleged in the amendments to be due and unpaid upon subscriptions to the stock of the Pacific Short Line Bridge Company and to the stock of the Sioux City Terminal Railway and Warehouse Company, with interest from the time of the delivery of said stocks to said Trust Company (pp. 335-7).

No answer or other pleading was filed to this amended petition; the first intimation these appellees had that the motion for leave to file it was granted, was by the insertion of a clause to that effect in the final decree. No testimony was submitted in support of this caricature of a pleading, and its sole office therefore would appear to be to set forth what the intervenor conceived the testimony established—in which aspect it is interesting only as revealing the hopeless confusion of legal theories upon which the appellant's contentions are based.

Hearing—Decree.

Evidence having been taken under the issues as closed by the filing of the replication on February 28, 1894, as above stated, the cause was argued before Judge Shiras on November 26 to 30, 1894, and a final decree entered on January 15, 1895, whereby

Decree.

it was adjudged that the intervenor was entitled to redeem the securities in controversy upon payment to J. Kennedy Tod & Co., as trustees, of the sum of $1,500,000, with interest thereon from December 30, 1892, to the date of payment, computed with semi-annual *rests** upon the 30th days of June and December in each year, on or before April, 21, 1895;

" and that upon payment of such sum and interest as aforesaid by said " intervenor to said J. Kennedy Tod & Company on or before the day " last aforesaid; or, if not accepted, then upon the tender thereof by " said intervenor to said J. Kennedy Tod & Company, on or before the " day last aforesaid, and the deposit thereof by said intervenor on or " before the day last aforesaid, in the registry of this Court for the " benefit of the holders of the notes secured by the indenture of trust " executed by A. S. Garretson to J. Kennedy Tod & Company, dated " December 30, 1892, all claim and title or equity in said securities on " behalf of the said J. Kennedy Tod & Company, as trustees, or other- " wise, shall terminate, and such securities shall be delivered to the in- " tervenor * * * that if the said E. H. Hubbard, as assignee of the " Union Loan and Trust Company, shall fail or refuse to pay, or tender " and deposit the above named amount, as aforesaid, on or before the " said 21st day of April, 1895, or the extended time in case of appeal and " affirmance as below fixed, then the said intervenor shall be and is " hereby barred and foreclosed of any equity of redemption in and to the " said securities or any part thereof, and the said petition of intervention " shall be and is hereby dismissed upon the merits" (p. 386).

The decree further provided that " in case an appeal to the United " States Circuit Court of Appeals from this decree by the intervenor shall " be taken on or before the 10th day of March, 1895, then, if this decree " be affirmed on such appeal, the time of redemption shall be extended " until forty-*five*† days after such affirmance."

Appeal.

Appeal. From this decree the intervenor prayed and was allowed an appeal to the Circuit Court of Appeals (p. 398).

Assignments of Error. His assignments of error are somewhat involved. They may, however, be summarized under three heads—

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* So in original. Erroneously printed "interest" in transcript, p. 386.

† So in original. Erroneously printed *full* in transcript.

(1.) Failure to find that petitioner had a *prior* lien on the securities in controversy because—

a. The securities were pledged to ~~it~~ the Union Loan and Trust Company by the owners thereof as security against liability on all endorsements on railroad syndicate paper which it might negotiate.

b. The *properties* represented by the securities were purchased or created with the proceeds of railroad syndicate paper endorsed and negotiated by the Union Loan and Trust Company.

Assgts. Nos. 1, 2, 3, 4, 5, 6, 7, 8, 10, 14, 15, 19.

(2.) Failure to find that the securities were wrongfully taken from Union Loan and Trust Company when rightfully pledged to it to secure any endorsements on railroad syndicate paper, and that defendants were not *bona fide* holders of the securities for value, but were chargeable with notice of the prior lien of the Union Loan and Trust Company and its assignee.

Assgts. Nos. 9, 10, 11, 12, 16, 17, 21.

(3.) Failure to find that the loans made through defendants, to secure which securities were pledged to them, were usurious and not made in the usual course of business, and therefore void, and consequently defendants could not hold the securities as against the intervenor.

Assgts., Nos. 13, 20.

The defendants also appealed from the decree of the Circuit Court, assigning for error (1) the failure of the Court to sustain their objections to many questions put by petitioner to witnesses whose testimony was taken before special examiners, and whereby substantially all the evidence going to establish any interest of the Union Loan and Trust Company in the securities was elicited (Assgts., 10

to 80); (2) so much of the decree as allowed the petitioner to file his second amended petition, and (3) the action of the Court in permitting the petitioner to redeem the securities in question upon paying the defendants' debt—a relief he had not asked, and no tender or offer to pay having been made, nor averment of willingness to pay.

The cause was argued in the Court of Appeals on October 16th and 17, 1895, before Judges Sanborn and Thayer.

Decision by Court of Appeals.

On April 13, 1896, a decision was handed down affirming the decree of the Court below, by a divided Court, no opinion being filed.

Petition for Rehearing.

The petitioner thereupon filed a petition for a rehearing, which was on June 22, 1896, denied, the Court then filing a *per curiam* opinion, in which, for the information of counsel, it was stated "that

Opinion Denying Rehearing.

"both of the Judges of this Court were and still are "agreed that the position taken by counsel for "E. H. Hubbard * * * relative to the bonds of "the Sioux City, O'Neill & Western Railroad Com- "pany" (necessarily including the Sioux City and Northern *stock*), "is untenable. One of the Judges "of this Court was of the opinion that the view en- "tertained by the trial Court and embodied in its "decree, * * * to the effect that the assignee "of the Union Loan and Trust Company should "be permitted to redeem said bonds, with "interest thereon from December 30, 1892, "to the date of payment, was in all respects "right. The other member of this Court "entertained the view that was contended for by "J. Kennedy Tod *et al.* * * * that the sale of "said bonds on September 26, 1893 to J. Kennedy "Tod & Company gave the latter firm a good title to "the securities so bought, and that the assignee of "the trust company was without right to redeem "the same." That further consideration had only strengthened and confirmed their views, and that under these circumstances no useful purpose would be subserved by granting the assignee a rehearing,

as the decree of the Circuit Court granting him the right to redeem afforded him as much as in any aspect of case he could hope to obtain by a re-argument.

The petitioner thereupon moved for and this Court granted its discretionary writ of *certiorari*, bringing up the case for review by it.

SUMMARY OF EVIDENCE.

APPELLEES' TITLE AND RIGHT TO POSSESSION.

Appellees possession and title to securities in controversy.

On October 5, 1893, when the intervening petition was filed, the defendants, J. Kennedy Tod, William S. Tod and Robert E. Tod, were co-partners engaged in business as bankers and dealers in investment securities, foreign exchange and credits, at No. 45 Wall street, in the City of New York, under the firm name of J. KENNEDY TOD & CO., having, in 1883, succeeded to the business of J. S. KENNEDY & Co., a firm which had been in existence for thirty-five or forty years previously. H. O. Northcote, a defendant in the intervening petition, had ceased to be a member of the firm on December 31, 1892, or January 1, 1893 (pp. 621, 1315, 1404, 1408).

J. Kennedy Tod & Co., on said date, were in the actual possession of certificates for 10,600 shares of the capital stock of the Sioux City and Northern Railroad Company, of the par value of $100 each, issued and registered on the books of said company in the names of "*J. Kennedy Tod & Co., Purchasing Trustees,*" bearing date October 4, 1893, as follows:

Viz.: Certificates Nos. 88 to 96 inclusive, and 98, 1,000 shares each	10,000 shares.
Certificate No. 97	600 shares.
Total	10,600 shares.

(pp. 1607-8).

These certificates had been issued on the surrender and transfer of certain other certificates of the same number of shares of stock in the said railroad company dated September 1, 1893, which had been issued and registered in the name of "J. Kennedy, Tod & Co." (pp. 1609-10).

The said defendants were also in the actual possession of 2,340 of the first mortgage five per cent. bonds of the Sioux City, O'Neill and Western Railroad Company, of $1,000 each, payable to bearer.

The said stock and bonds were held by defendants as trustees under a certain INDENTURE of TRUST, executed to them by one A. S. GARRETSON, dated December 31, 1892, and acknowledged by Garretson before E. H. Hubbard (the intervenor) as notary public, on January 5, 1883 (p. 632), whereby said Garretson pledged 14,200 shares of the stock of The Sioux City and Northern Railroad Company and $2,340,000 of the first mortgage bonds of the Sioux City, O'Neill and Western Railway Company as security for the payment of the interest and principal of 300 promissory notes of $5,000 each, made by the Pacific Short Line Bridge Company, and endorsed by said Garretson.

Each of the said notes carried an endorsement signed by said Garretson, setting forth that it, together with the other notes of said issue was "secured by a certain indenture of trust, dated "the 31st day of December, 1892, between the "undersigned and J. Kennedy Tod & Co., as trus-"tees, and the deposit thereunder of certain bonds "and stocks, as collateral securities, to which in-"denture reference is hereby had with the same "effect as if it were here set forth at length" (p. 634).

All of said notes had been duly issued and were in the hands of divers and sundry parties who had purchased them for cash at their face, and were the *bona fide* holders thereof.

Circumstances leading to pledge.

The history of the dealings of Messrs. J. Kennedy Tod & Co. with Garretson, and of the circumstances

leading up to and connected with the pledge of the aforesaid stock and bonds, as disclosed by the evidence, was briefly as follows:

In the early part of 1891 Messrs. Tod & Co. had purchased from Garretson the entire issue of the first mortgage bonds of the Sioux City and Northern Railroad. They subsequently made him certain loans upon collateral. In October, 1891, they procured for him a loan of one million dollars represented by his demand notes in the sum of $5,000 each, to enable him to procure the control and ownership of what was then known as the Nebraska and Western Railway, which was about to be sold under decree of foreclosure. This loan was secured by the pledge to Tod & Co., as trustees for the benefit of the holders of said demand notes, of one-half of the capital stock of the Sioux City and Northern Railroad (7,200 shares) and all of the bonds of the Nebraska and Western Railway, with leave to use such bonds in the reorganization of the Nebraska and Western Railway. The said railway was sold under foreclosure, and reorganized, and the entire issue of the first mortgage bonds of the Sioux City, O'Neill and Western Railway, a new corporation organized to acquire the Nebraska and Western Railway were substituted in pledge for the bonds of the latter company. Garretson was known to Tod & Company to be engaged with other persons in Sioux City in various enterprises there, and was supposed by them to be a man of large wealth. In December, 1892, Tod & Company having intimated to Garretson that the $1,000,000 loan would be called for payment on January 1, 1893, he came to New York to negotiate a renewal of that loan, and to raise an additional sum of money with which to complete the construction of a bridge across the Missouri River at Sioux City, to unite the Sioux City and Northern Railway, in Iowa, with the Sioux City, O'Neill and Western Railway, in Nebraska (Record, p. 734). The bridge was under construction by an Iowa corporation

known as the Pacific Short Line Bridge Company, all of whose stock was owned by Garretson and his associates, and was pledged under the mortgage of the Sioux City, O'Neill and Western Railway to the Manhattan Trust Company, to secure the first mortgage bonds of that company all of which bonds were owned by Garretson and his associates, and were pledged to Tod & Co. to secure the $1,000,000 loan; and all of the stock of the Sioux City, O'Neill and Western Railway Company was also owned by Garretson and his associates. After some negotiation with Tod & Company in New York, it was finally agreed that they would procure for Garretson a loan of $1,500,000 secured by all the bonds of the Sioux City, O'Neill and Western Railway and 14,000 shares of stock of the Sioux City and Northern Railway Co., out of which new loan the $1,000,000 demand notes should be paid —thereby releasing the collateral held for their security—and the balance of the loan used in the completion of the Pacific Short Line Bridge Company's bridge (pp. 734, 1324–5). The understanding between the parties when Garretson returned to Sioux City was, that the Union Debenture Company, of New Jersey—a corporation which was controlled by Messrs. Tod & Company, who owned one-third of its stock—would make the loan, and that the Sioux City, O'Neill and Western Railway Company should be the borrower; and the matter was placed in the hands of counsel to prepare the necessary papers.

Objection being made to the capacity of the Sioux City, O'Neill and Western Railroad Company to contract the loan, Mr. Tod suggested that it be taken by the Pacific Short Line Bridge Company (pp. 13, 16, 793). This suggestion was adopted.

Meeting of Directors Pacific Short Line Bridge Co. December 26, 1892.

A meeting of the directors of the Bridge Company was thereupon held in Sioux City on December 26, 1892 at which certain resolutions were adopted which recited that A. S. Garretson, D. T. Hedges, John Hornick and Ed. Haakinson were the owners of $2,340,000 of the first mortgage bonds of the Sioux City, O'Neill and Western Rail

way, being the entire issue of said bonds and 10,200 shares of the capital stock of the Sioux City and Northern Railroad Co., being all of its stock issued and outstanding except 4,200 shares; that the bridge of the company in process of construction was to connect with the Sioux City, O'Neill and Western Railway on the western side and with the Sioux and Northern on the eastern side of the Missouri River, and it was therefore to its interest to obtain control of said railroads especially during construction of the bridge; it was therefore

RESOLVED that the company purchase such stock and bonds of Garretson, Hornick, Hedges and Haakinson for the sum of $1,500,000, payable in equal amounts on the first days of February, March and April 1894, with interest from date at 6 per cent. per annum, and that to secure the payment of said sums, the company make its three hundred promissory notes in the sums of $5,000 each, aggregating in all $1,500,000, payable to the order of A. S. Garretson; and that it pledge all of said bonds and stock to Garretson as security for the payment of said notes, in such form and with such provisions as the president of the company might approve; further resolved that an option be given to Garretson to repurchase said bonds and stock or any part thereof at any time before the maturity of the notes for the price of $1,447,500 for the whole amount of the notes, or proportionately for any smaller amount, provided the same be deposited with Tod & Company, to be applied toward the payment of the said notes, or that the notes be retired and surrendered to the company.

The minutes further recited that the president produced to the meeting a form of agreement proposed to be executed to carry out the foregoing resolutions, whereupon, "on motion of Mr. F. C. "Hills, seconded by Mr. J. C. Coombs, it was

"Resolved, that the president, or vice-president,

" or secretary be and they are hereby authorized " and directed to execute the same under the cor- " porate seal of the company."

A certified copy of these resolutions was produced and offered in evidence (Deft.'s Ex. 37, p. 1498).

The appellants in their " Brief and Argument on the Facts," used in the Court of Appeals, said, at page 30: " The Pacific Short Line Bridge Company. " The records and early history of this corporation " cannot be found (P. R., 780) so as to be stated in " detail;" and again, at page 57: " The notes and " contract were not authorized by the Bridge Com- " pany or its directors, nor were the officers pur- " porting to execute them anthorized so to do. " * * * The Bridge Company's books and records " have been lost " (P. R., 780).

The reference is to the cross examination by defendants' counsel of A. S. GARRETSON, one of petitioner's witnesses, on August 3d-4th, 1894, who having stated that he could not answer how much money had been expended towards the construction of the bridge up to the end of December, 1892, without having recourse to their books, and, being asked where the books were, stated that a part of them were left with Mr. C. L. Wright, of Wright & Hubbard, and a part in the safe in the office of Mr. Goodwin, the vice president of the company; that he thought a portion of the books were still with Wright & Hubbard, and that he had heard that the contents of the safe were taken by Mr. Faxon, of the Credits Commutation Company, one of the counsel for the intervenor then present.

Defendant's counsel then called upon petitioner's counsel to produce the books, whereupon all three counsel present stated on the record that they had not seen the books, although they had searched diligently for them (pp. 780-81).

A great effort was made by the petitioner's counsel before the certified copy of the resolutions (Deft.'s Ex. 37, *supra*) had been produced or its existence disclosed, to create a doubt as to whether or

not there had actually been a meeting of the Directors of the Bridge Company (pp. 915, 916, 918), but when the defendants came to take their proofs, they showed that before the loan transaction of December 30, 1892, was closed, and before any consideration was advanced, Messrs. J. K. Tod & Co. were furnished with a duly certified copy of the minutes of a meeting of the directors of the Bridge Company, held December 26, 1892, of which each director had due notice, at which the purchase of the securities and the making of the contract with Garretson, Hedges, Hornick and Haakinson, and the execution of the $1,500,000 of notes to Garretson's order and the pledge of the securities to secure the payment thereof were all duly authorized (p. 1341).

This certified copy was offered in evidence (Deft.'s Ex. 37, Aug. 30, 1894, p. 1498, *vide supra*), and its accuracy was attested by the testimony of Messrs. W. H. Goodwin, the vice-president (p. 1247), Craig L. Wright (p. 1612) and F. C. Hills (p. 1590), all of whom were present at the meeting and the latter of whom certified to the correctness of the copy on the day of the meeting, December 26, 1892.

An effort by intervenor's counsel to create an appearance of mystery about the disappearance of the books of the Bridge Company, was unexpectedly turned upon themselves by the testimony of Mr. Hubbard that, after some search, the books were *finally found in his office*, and that he informed either Mr. Coombs or Mr. Silverthorn, counsel for the petitioner, that he had discovered them, and at their request took them *and left them in the office of the Credits Commutation Company* (the company organized by the creditors of the Union Loan and Trust Company, and the actual plaintiff in this cause), and went out, locking the door after him, and that he had never seen the books since then; that another book that he had left there at the same time had been returned, but not

the Pacific Short Line Bridge Company's books (pp. 1573–4). It is significant that with all the elaborate and quite improper statements and eager protestations made by the three other counsel for the petition concerning these books (pp. 780–2, 912–13), Mr. Silverthorn has never been heard from on the subject.

No allusion to this is found in appellant's statement of the evidence, which merely states that "the "notes and contracts were not authorized by the "Bridge Company or its directors, nor were the "officers purporting to execute them authorized "so to do. * * * *The Bridge Company's books "and records have been lost!*"

Agreement Garretson *et als.*, with Pacific Short Line Bridge Co., Dec. 31, 1892.

An AGREEMENT was thereupon executed, bearing date December 31, 1892, between A. S. GARRETSON, D. T. HEDGES, JOHN HORNICK and ED. HAAKINSON, of the first part, and the PACIFIC SHORT LINE BRIDGE COMPANY, of the second part (Deft.'s EX. 36, p. 1494), which after reciting that the parties of the first part were the owners thereof, sold, assigned and transferred to the Bridge Company all of the Sioux City and Northern Railroad Company, excepting 4,200 shares thereof, and all of the bonds of the Sioux City, O'Neill and Western Railway Company for $1,500,000, $500,000 of which was to be repaid on the first days of February, March and April, 1894, respectively, with interest at 6 per cent. from date, and that to secure the payment thereof the Bridge Company should forthwith make and deliver unto said A. S. Garretson its promissory notes payable to his order, dated December 30, 1892, in sums of $5,000 each, aggregating $1,500,000 in all, divided into three series of $500,000 each, to be designated as series A, B and C, maturing on the first days of February, March and April, 1894, respectively, bearing interest at 6 per cent. per annum, payable July 1, 1893, January 1, 1894, and at maturity, at the office of Tod & Co., in the City of New York. The agreement further provided that whereas Garretson

desired to sell and transfer said notes and furnish additional securities therefor, each of said notes should provide that in case of default in the payment of any instalment of interest upon any note, continued for thirty days, the principal of all of the notes might forthwith become due and payable at the option of J. Kennedy Tod & Co., to be declared in writing on behalf of the holders of said notes; which option should be exercised upon the written request of the holders of a majority of the notes. That the $2,340,000 of the Sioux City, O'Neill & Western Railway bonds and the said entire issue of Sioux City and Northern R. R. stock (excepting 4,200 shares) "*be and are hereby pledged* "*unto the said A. S. Garretson as security for the* "*payment of said notes.*" The agreement also contained the following provisions:

"*Third.*--It is further agreed that the said notes "shall be prepared and executed in the name of this "company by its President and Secretary, and shall "be forwarded to J. Kennedy Tod & Co., who shall "deliver the same to A. S. Garretson, or on his "order, *but only upon the receipt of said $2,340,000* "*of bonds, and the entire issue of stock of the Sioux* "*City and Northern Railway Company (excepting* "*4,200 shares) for delivery to the party of the* "*second part, or as a deposit and pledge of the same* "*to said J. Kennedy Tod & Co., as trustees, to se-* "*cure the equal and pro rata payment of the said* "*notes;* and the said A. S. Garretson is hereby "authorized to transfer or pledge said stock and "bonds as security for the payment of the principal "and interest of said notes, upon such terms and "conditions as he may approve."

It was further agreed that Garretson should have an option to repurchase said stock and bonds at any time before April 1, 1894, for $1,447,000, or any part thereof at proportionate prices, provided notes to an amount equal to the sum required to be paid to avail of the option be retired, or such amount de-

posited with Tod & Co. to be applied toward the payment of said notes.

This agreement was signed and sealed by all of the parties thereto of the first part, and acknowledged before *E. H. Hubbard* (the petitioner herein), *Notary Public*, on December 31, 1892. It was also signed *Pacific Short Line Bridge Company, by W. H. Goodwin, Jr., Vice President*, its corporate seal affixed, attested to by J. C. Coombs, Secretary, and acknowledged on January 5, 1893, on behalf of the corporation by W. H. Goodwin, Jr., Vice President, *before the same E. H. Hubbard, Notary Public* (p. 1497).

Pursuant to the authority conferred by the directors of the company at the meeting above referred to the 300 notes of the Pacific Short Line Bridge Company were prepared and executed in following form (see Ex. 18, July 13, '94, p. 659).

" Series.....
No.....

$5,000.

THE PACIFIC SHORT LINE BRIDGE COMPANY.

NEW YORK, December 30th, 1892.

The Notes of the Pacific Short Line Bridge Co.

On the first day of March, 1894, without grace, the Pacific Short Line Bridge Company, for value received, hereby promises to pay to the order of A. S. Garretson, at the office of J. Kennedy Tod & Co., in the City of New York, the sum of five thousand dollars ($5,000.00) in United States gold coin of the present standard weight and fineness, and to pay interest thereon in like gold coin at the same place, at the rate of six per cent. per annum from date until payment of this note, such interest to be paid on the 1st day of July, 1893, the 1st day of January, 1894, and at the maturity of this note, and upon production of this note, in order that such payment of interest may be endorsed thereon.

This note is one of an issue of notes of like amount, tenor and date, aggregating in all the sum of $1,500,000, divided into three series, of $500,000 each, Series A being payable on February 1, 1894; Series B on March 1, 1894, and Series C on April 1, 1894. The said A. S. Garretson desiring to sell and transfer said notes and provide collateral security therefor in the manner provided in the endorsement printed hereon, to which reference is hereby had for a complete understanding of the rights of the parties, the undersigned company agrees that in case default be made in the payment of any instalment of interest upon any note of said issue when the same becomes due and payable according to its terms, or if default be made in the payment of the principal of any of said notes of either series when due, before notes of other series are payable, and such

default continue for thirty days, the principal of this note and of all other notes of the said issue may forthwith become due and payable, at the option of J. Kennedy Tod & Co., to be declared in writing, on behalf of the holders thereof, anything herein contained to the contrary notwithstanding; and the said J. Kennedy Tod & Co., shall exercise such option upon the written request of the holders of a majority of said issue of notes at the time of such request outstanding.

PACIFIC SHORT LINE BRIDGE COMPANY,
By W. H. GOODWIN, Jr.,
Vice-President.

Attest:
J. C. COOMBS,
[SEAL.] Secretary.

These notes as executed were endorsed as follows:

(ENDORSEMENT): The within note, together with all the other notes of the Pacific Short Line Bridge Company, therein referred to, amounting in the aggregate to $1,500,000, is further secured by a certain Indenture of Trust, dated the 31st day of December, 1892, between the undersigned and J. Kennedy Tod & Co., as trustees, and the deposit thereunder of certain bonds and stocks as collateral securities, to which indenture reference is hereby had with the same effect as if it were here set forth at length.

This note, and all rights to the benefit of said indenture of trust, shall pass by delivery, but shall not be entited to the benefit and security of said indenture of trust unless the certificate below shall be signed by J. Kennedy Tod & Co., the trustee in the said indenture named.

Dated New York, December 31st, 1892.

A. S. GARRETSON.

(CERTIFICATE): It is hereby certified that this note is one of the notes amounting in the aggregate to $1,500,000, specified in the indenture of trust above referred to.

Dated New York, December 31st, 1892.

J. KENNEDY TOD & Co.,
Trustees.

(Endorsed.)
Notice and protest waived.
A. S. GARRETSON.

The said notes, with the agreement and a certified copy of the resolutions of the Directors of the Bridge Company were thereupon forwarded to Messrs. Tod & Co. at New York, together with an INDENTURE OF TRUST, dated December 31, 1892, executed by A S. GARRETSON, as party of the first part, to J. KEN-

Indenture of Trust. Garretson to Tod & Co., Dec. 31, 1892.

NEDY TOD & CO., as trustees, parties of the second part, and acknowledged by A. S. Garretson before the same *E. H. Hubbard*, Notary Public (the Intervenor), on January 5, 1893 (p. 632). This instrument set forth that Garretson had acquired and owned the promissory notes of the Bridge Company to the aggregate amount of $1,500,000 which he had agreed to sell, duly endorsed by him, and to secure by the deposit with the said trustee, of the Sioux City & Northern stock and the Sioux City, O'Neill and Western bonds above mentioned, and he therefore sold, assigned and delivered unto J. Kennedy Tod & Co. the said 2,340 bonds of the Sioux City, O'Neill and Western Railroad Company of $1,000 each, with coupons falling due on and after April 1, 1893, attached, and 14,200 shares of the Sioux City and Northern R. R. Co., of the par value of $100 each, certificates for which, duly endorsed for transfer in blank, it was recited, had been delivered to the trustees simultaneously with the execution of the Indenture of Trust, to have and hold said bonds and stock

" *in trust for the equal pro rata benefit and security of all the holders from* " *time to time of the said notes hereinbefore described, without preference,* " *priority or distinction as to lien or otherwise of any of said notes over the* " *other*, and upon and subject to the terms and conditions following, that " is to say, among other things:

* * * * * *

" *Fourth.*—The party of the first part hereby guarantees the punctual " payment of the principal and interest of said notes, and each of them, " as the same become due and payable, according to the tenor thereof. " In case default be made in the payment of the principal or interest of " any of said notes or of any part thereof when and as the same become " due according to their terms, and such default shall continue for thirty " days, the Trustees shall have authority and power in their discretion " forthwith to cause all or any of the said shares of the capital stock of " the Sioux City & Northern Railroad Company to be transferred upon " the books of the said company into the names of the said J. Kennedy " Tod & Co., Trustees as aforesaid, or into the name or names of one or " more of the members of said firm or into the name or names of such " nominee or nominees as the said Trustees shall designate." * * *

" *Fifth.*—In case default shall be made in the payment of any principal " or interest on any of the notes of the entire issue of three series secured

" hereby, according to the tenor thereof, and said default shall continue " for thirty days, then and in that case, the said Trustees may, and upon " request by the holders of one-half in amount of the notes secured " hereby at the time outstanding, shall declare the principal and interest " of all such notes of the several series so outstanding and secured " hereby, to be and the same shall thereupon become immediately due " and payable, anything in said notes or herein contained to the con- " trary notwithstanding. Such declarations shall be made by written " notice signed by the Trustees and delivered to the party of the first " part, and to the maker thereof, or deposited in the Post Office in the " City of New York, in a post-paid envelope, addressed to the said party " of the first part, and said makers at Sioux City, Iowa. And the said " Trustees may, and upon the written request of the holders of a " majority in amount of the said notes secured hereby and then out- " standing, shall proceed to sell at public auction, in the City of New " York, the said bonds and stock then constituting the trust for the " security of such notes, so outstanding, after advertising a notice of such " sale not less than once a week for two weeks in at least two daily news- " papers published in the City of New York, and in one or more daily " newspapers published in Sioux City, Ia., and the said trustees may sell " the said shares of stock or the certificates therefor, and the said bonds " in one lot or parcel, or in several lots or parcels, and at the same time, " or at different times, as they may in their discretion deem best, pro- " vided that such discretion shall be controlled by the written request of " the holders of the majority of the said notes secured hereby then out- " standing, and the said trustees may from time to time adjourn such " sale or sales in their discretion by public announcement at the time " and place of sale so fixed, without further publication of notice; and " upon any such sale or sales the said trustees may assign, transfer and " deliver to the purchaser or purchasers thereof the said shares of stock, " and the said certificates therefor so sold, or the said bonds so sold, and " such sale or sales shall be a perpetual bar at law and in equity against " the party of the first part, and all persons or corporations claiming or " to claim by, through or under him." * * *

" *Eighth.* * * * The purchaser or purchasers at any such sale, in " making settlements therefor or on payment of the purchase money bid, " shall be entitled, after making such cash payment as may be required " by the trustees, or by the decree of the Court, in case of sale under such " decree, on presenting any of said notes, to be credited on account " thereof, with the portion of the net proceeds of the sale which would be " applicable to the payment of such notes so presented upon a just and " proper distribution among the holders of the notes secured hereby and " then outstanding.

" The holders of two-thirds in amount of the notes at the time out- " standing secured hereby, may in their discretion appoint a purchasing " trustee, to purchase the securities sold at any such sale for the use and " benefit of the holders of all the outstanding notes then secured hereby; " and any purchasing trustee so appointed shall be fully authorized to " make such purchase for and on behalf of all the holders of outstanding

" notes issued hereunder and secured hereby, and having purchased said
" securities, the right and title thereof shall vest in the purchasing trustee
" so appointed, in trust for the benefit of all of said note holders in pro
" portion to the amounts remaining due on account of their respective
" notes."

At the foot of the Indenture was endorsed the following:

" The foregoing is the Indenture of Trust referred to in the notes of the
" undersigned dated December 30, 1892, and the indorsements thereon,
" and the provisions thereof are assented to by the undersigned.

" THE PACIFIC SHORT LINE BRIDGE COMPANY,
" By W. H. GOODWIN, Jr.,
" Vice-President."

Contract Garretson with Union Debenture Co.

A CONTRACT was also executed between ARTHUR S. GARRETSON and THE UNION DEBENTURE COMPANY, a New Jersey corporation, dated December 30, 1892 (Int. Ex. 1, p. 667), which recited that Garretson was the owner and holder of the said three hundred promissory notes of the Pacific Short Line Bridge Company, that the Bridge Company, as security for the payment of the same, had pledged to Garretson, first mortgage bonds of the Sioux City, O'Neill and Western Railway Company, and 10,200 shares of the capital stock of the Sioux City and Northern R. R. Co., and had authorized him to transfer and pledge said stock and bonds as security for the payment of the principal and interest of said notes upon such terms and conditions as he might approve; that Garretson was also the owner of 4,000 additional shares of Sioux City and Northern R. R. stock, and that he had also an option to purchase all or any part of the said 10,200 shares of stock and the bonds, at any time prior to April, 1894. It was therefore agreed that Garretson should endorse said notes, and deliver them to the Debenture Co. or on its order, upon payment of the par value of said notes to him, and upon the execution of an indenture of trust, transferring and conveying the Sioux City & Northern stock and the Sioux City, O'Neill &

Western bonds unto J. Kennedy Tod & Co., as trustees, as security for the equal and *pro rata* payment of said notes, upon satisfactory terms and conditions, and upon the endorsement upon each of said notes of a reference to said agreement and a brief statement of the security afforded thereby as therein provided; that thereupon the trustees should execute a certificate upon each note that the holder thereof was entitled to the benefit of the said collateral, without which no note should be entitled to the benefit thereof.

It was further agreed that if at any time Garretson should satisfy the trustees, Tod & Co., that the remaining collateral was adequate security for the said $1,500,000 notes, and that it was to the interest of the properties represented by said securities, then the trustees might release and re-deliver to Garretson 4,000 shares of Sioux City and Northern Stock, or any part thereof; that the decision of the trustees with respect thereto should be final and binding, and that the indenture of trust should contain provisions accordingly. It was further agreed that the Debenture Co. should procure the notes to be sold at par and accrued interest within one month from date, or should purchase the same at par and accrued interest, and advance thereon at once to Garretson $1,100,000 and such additional amount not exceeding $400,000 as he might require.

That in consideration of the acts and things to be done thereunder, the Debenture Co. should be entitled to an option until December 1, 1893, to purchase 7,200 shares of the Sioux City & Northern stock, so pledged, at its actual cost to Garretson and his associates, not exceeding 95 per cent. of its par value; and also an option to purchase all or any of the Sioux City, O'Neill and Western bonds, at 90 per cent. and accrued interest, the bonds in the event of the exercise of such option to be guaranteed by the Sioux City and Northern Railroad Company. That in further payment of the services of the Debenture Company, Garretson should pay to it a commission

of 3½ per cent. upon the amount of said notes, to be deducted and retained out of the purchase price of said notes or any amounts advanced thereon.

Delivery of collaterals to Tod & Co.

At that time all of the bonds of the Sioux City, O'Neill and Western R R. Co., one half of the stock of the same company, and 7,200 shares of the capital stock of the Sioux City and Northern Railroad Company were and had been for months in the hands of Messrs. J. Kennedy, Tod & Co., as trustees under an agreement with A. S. Garretson, dated October 1, 1891, whereby such stocks and bonds were pledged to them in trust to secure the payment of Garretson's demand notes bearing even date therewith, aggregating in amount the sum of $1,000,000, and which notes had therefore to be paid before the collaterals held for the security of the same could be released and pledged under the agreement of December 31, 1892, or simultaneously therewith. Of the remaining 7,000 shares necessary to make up the whole number to be pledged under the agreement, certificates for 1,000 shares were sent to Tod & Co. by E. R. Smith, Secretary of the Union Loan and Trust Company, on January 16, 1893 (Ex. 4, p. 652); and certificates for 6,190 shares were delivered to them by Garretson on Dec. 9, 1892, when he was in New York.

Sale of Notes, Jan. 30, 1893.

Owing to delays in sending papers back to Sioux City to correct an informality in the original endorsement of the notes, the transaction was not actually concluded until January 30, 1893 (p. 1016).

The method of carrying out this trasaction is succinctly described by Messrs. J. Kennedy Tod & Co. in their letter to Garretson, under date of January 31, 1893 (p. 1014).

"Acting on your behalf," they wrote, "we paid off your notes for $1,000,000 at par and interest, debiting your account with $1,004,833.33, as per memo. inclosed herewith.

"Having paid off this loan, we released the $2,340,000 Sioux City, O'Neill and Western First Mortgage Five Per Cent. bonds, the 18,000 shares of the

Sioux City and Western stock, and the 7,200 shares of Sioux City and Northern Railway Co. stock, and received them on our books for your account.

"We had received from the Pacific Short Line Bridge Company its notes for $1,500,000, as called for in the contract between you and others and it, made the 31st of December, 1892.

"In accordance with the authority given us by you we took from your account $2,340,000 Sioux City, O'Neill and Western first mortgage 5 per cent. bonds, 10,200 shares of Sioux City and Northern Railway Co. stock, and also 4,000 shares of the Sioux City and Northern Railway Co. stock and delivered them to ourselves as trustees under the Indenture of Trust made by you under date of 31st of December, 1892. We therefore certified the $1,500,000 Pacific Short Line Bridge Co. notes, and received them from the company for your account.

"The notes having been drawn to your order and endorsed by you, we delivered them on your behalf to the Union Debenture Company and received payment at par and interest, crediting your account with $1,507,500 as per the memo. enclosed herewith. We have debited your account with $52,500, which amount we paid to the Union Debenture Company for its services in this connection" (Petr.'s Ex. 44, p. 1014).

The 14,200 shares of Sioux City and Northern stock so received in pledge by Messrs. J. Kennedy Tod & Co. were represented by the following certifidates with transfers endorsed thereon:

In name of A. S. Garretson:

Certificates Nos. 10 to 14, 500 shares each; Nos. 49 and 50, 100 shares each; No. 51, 44 shares; No. 52, 180 shares, and No. 53, 320 shares. Total ..... 3,244 shares.

In name of D. T. Hedges:

Nos. 16, 17, 18, 19 and 20, 500 shares each; No. 21, 378 shares. Total ..... 2,878 shares.

In name of John Hornick:

Nos. 3, 4, 5, 6, 7, 8, 500 shares each; No. 34, 379 shares. Total ..... 2,879 shares.

In name of Ed. Haakinson:

Nos. 28, 29, 30, 31, 500 shares each; No. 33, 378 shares. Total ..... 2,378 shares.

In name of A. S. Garretson, trustee:

Nos. 44, 45, 46, 47, 48, 500 shares each; No. 40, 178 shares; No. 41, 200 shares; No. 43, 134 shares. Total ..... 3,012 shares.

In all 14,391 shares, being 191 shares more than the requisite number (see Letter Tod to A. S. G., Jan. 31, 1893, *supra*).

After paying off Garretson's million dollar loan, and the agreed commission of the Union Debenture Company, there remained, therefore, a balance of $450,166.67 to Garretson's credit out of the new loan, which was paid out from time to time on his drafts (Petr.'s Ex. 2, p. 644; W. S. T., pp. 413, 416, 418-19, 421). All of said balance Garretson represented to Tod & Co. was to be applied to the construction of the Pacific Short Line Company's bridge, and *a large portion thereof was actually so applied.*

Pending the completion of the papers, between January 1st and February 4th, Messrs. J. Kennedy Tod & Co., at Garretson's request, advanced to the Pacific Short Line Bridge Company, directly upon drafts made upon them by it, the sum of $132,025.62 (Deft.'s Ex. 151*a* and 151*b*, p. 1552), which amount was repaid to them by Garretson by his draft against the proceeds of the $1,500,000 loan on February 10, 1893 (Petr.'s Ex. 2, p. 644). Precisely how much more was actually expended on the bridge was not shown. Oakley, who had been a clerk to Garretson, testified that he thought Garretson had expended approximately from $160,000 to $170,000 for the Bridge Company after December 1, 1892, but he did not know accurately (p. 1611), while GARRETSON himself testified that about $200,000 of

the money went to pay the bridge estimates, and the balance went to the Union Loan and Trust Company to the credit of the account of the Railroad Syndicate to be hereafter referred to (p. 778).

The Union Debenture Company sold the Bridge Company notes for cash to various parties, through J. Kennedy Tod & Co. as its brokers (pp. 616-17), except $40,000 thereof, which it still retains (pp. 613-14). The Great Northern Railway Company bought $500,000 of them (p. 425); Tod & Co. purchased $590,000 of them for certain of their foreign correspondents, who took and paid for the same (p. 1393); John S. Kennedy, $100,000; the Manhattan Company (not the *Manhattan Trust Co.*), $50,000; and the balance were sold to various individuals (p. 1513).

Messrs. J. Kennedy Tod & Co. purchased none of the notes for their own account (pp. 618-19), and, save as trustees, have no direct interest in the securities. They own about one third of the stock of the Union Debenture Company (p. 417), and one of the firm is a stockholder and director in the Great Northern Railway Line. This is the extent of their pecuniary interest in the matter. Neither the said firm nor any member of it received any part of the $52,500 commission paid to the Union Debenture Company for negotiating the loan (pp. 416-17; 420-21).

Reasons for transaction taking form of loan to Bridge Co.

The appellant attacks the *bona fides* of the foregoing transaction as being purely a device to cover a usurious transaction, and contends that the defendants were not *bona fide* holders for value of the securities in controversy, and that they took the same charged with notice of plaintiff's alleged prior title.

As has been shown, the terms of the loan were negotiated between J. Kennedy Tod & Co. on behalf of the Union Debenture Company, and A. S. Garretson (pp. 1324-5). As first arranged, the agreement was that the loan was to be made to the Sioux City, O'Neill & Western Railway; the matter was placed in the hands of counsel to prepare the papers and Garretson went west.

A statute of Nebraska, applicable to corporations in force in December, 1892 (Compiled Stats., 7th Ed., 1891, Chapter 16, Sec. 128), provided as follows, viz.:

"The articles of incorporation must fix the highest "amount of indebtedness or liability to which the "corporation shall at any one time be subject, which "must in no case exceed two thirds of the capital "stock;" and also (1839, Sec. 136):

"Every corporation hereafter created shall give "notice annually in some newspaper printed in the "county or counties in which the business is trans-"acted * * * of the amount of all the existing "debts of the corporation."

And Section 142, provided that, "*Any violation of the provisions of this subdivision shall cause a forfeiture of all the privileges conferred by the same, and the Court may proceed to close the affairs of the corporation by an information for that purpose.*"

The articles of incorporation of the Sioux City, O'Neill and Western Railway fixed its capital stock at $3,600,000, and the highest amount of indebtedness to which it should at any time subject itself at $2,400,000 (p. 1636). It had issued its first mortgage bonds creating an indebtedness to the amount of $2,340,000 in January, 1891 (p. 1507), which bonds were held by J. Kennedy Tod & Co. as collateral to Garretson's $1,000,000 demand notes, and which were to be a part of the collateral to the new loan.

Because of these legal restrictions upon the right of the railroad company to incur further debt, counsel advised against making the loan to it. Mr. J. Kennedy Tod then suggested to Garretson that the Pacific Short Line Bridge Company take the loan and make the notes (pp. 1316, 1328-9).

It was eminently proper that this corporation should contract directly for the loan. The Company was organized under the laws of Iowa for the pur-

pose of constructing a bridge across the Missouri River at Sioux City, connecting the Sioux City and Northern R. R. with the Sioux City, O'Neill and Western Railroad, Congress having authorized the construction of such bridge (25 Stats. at Large, 849; 26 Stats. at Large, 79).

By the statute under which it was incorporated, (Miller's Revised Annotated Code of Iowa, 1888, §§ 1058–9), it had power "*to make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy.*"

Under this act, a corporation may purchase even its own stock—*a fortiori*, the stock or bonds of other companies.

Iowa Lumber Co. v. *Foster*, 49 *Iowa*, 25.
Rollins v. *Wagon Co.*, 80 *Iowa*, 380–390.

And it may acquire stock and bonds of another company either by purchase, or as collateral security to a loan.

Calumet Paper Co. v. *Investment Co.*, 96 *Iowa*, 147–153.

The appellants in their brief on facts in the Court of Appeals (p. 30), admit that "in October, 1891, the "control of the stock of the Pacific Short Line "Bridge Company appears to have been in Garret- "son, or the Syndicate; that the actual amount "thereof was $2,000,000; that the purpose of the "corporation was the construction of a bridge across "the Missouri River at Sioux City, under charter by "Congress; that it had been principally promoted "by officers and associates of the Wyoming Pacific "Improvement Company, and at the time of the "failure nearly $500,000 had been spent upon it (P. "R., 781). * * * *The Bridge was essential to the "unity and success of the other Railroad Syndicate "properties* (P. R., 1350, 1668), and the prosecution "of its construction was adopted by the Railroad

"Syndicate after it had become embarked in the "Nebraska and Western Enterprise."

From the time of Tod & Co.'s first large dealing with Garretson he had held himself out to them as the owner; or at least as in full control of the stock of the Bridge Company, and the agreement for the demand loan of $1,000,000, dated October 1, 1891 (Petr.'s Ex. No. 3, p. 646), which recited that it was made to enable Garretson to purchase the Nebraska and Western Railroad for himself and his associates, contained a covenant that the bonds of the new company to be formed on the foreclosure of the Nebraska and Western Railroad mortgage should "be further secured by "all of the stock of the Pacific Short Line Bridge "now under construction by such bridge company, "except such part, not to exceed fifty shares, as "shall be required to qualify directors, and that the "same shall, as far as issued, and from time to "time when issued, be at once deposited with the "bankers (Tod & Co.), as trustees, to be delivered "to the trustee under said mortgage so to be exe-"cuted to secure the said new issue of bonds upon "the said railroad when the same shall be purchased "and transferred as aforesaid" (pp. 648-9).

The stock of the Bridge Company was divided into 20,000 shares of $100 each, which were issued November 13, 1891, in four certificates for five thousand shares each in the name of "A. S. Garretson, trustee" (p. 1595), and these certificates were on November 19, 1891, delivered by Garretson to Tod & Co., who on December 14, 1891, delivered them to Manhattan Trust Company (p. 1386), as trustee under the mortgage of the Sioux City, O'Neill and Western Railway Company (pp. 1110, 1111) pursuant to said agreement (pp. 647-8).

Garretson himself testified for the petitioner that the purpose of the new $1,500,000 loan was to take up the $1,000,000 loan which matured December 30th, "*and of getting additional funds with which to carry on the construction of the bridge to a point*

where we could get money from the bonds of the Bridge Company to complete it" (p. 734).

The president of the Credits Commutation Company, the corporation formed by certain creditors of the Union Loan and Trust Company who are the actual prosecutors of this proceeding (p. 887), in his affidavit filed on the motion for leave to intervene, October 4, 1893, stated that as the result of the investigation made by their committee, it appeared to them that the Sioux City, O'Neill and Western Railway, the Sioux City and Northern Railroad and the other properties of the Railroad Syndicate, "were, to a large extent, mutually and reciprocally "dependent upon each other; that a bridge con- "nection which would bring the Sioux City, O'Neill "and Western Railroad into Sioux City at a less "charge than now paid, would enable that corpora- "tion to make net earnings, and that whatever it "paid for crossing the river might be turned to the "support of the proposed Pacific Short Line Bridge" (p. 1170).

And, again, "Then the building of the bridge "would greatly increase the value of the Sioux City, "O'Neill and Western Railroad, and thus it was "thought that the Sioux City, O'Neill and Western "Railroad, and the Sioux City and Northern might "both guarantee the bridge bonds, which would "very materially increase the value thereof" (pp. 1172-3).

The statutes of Iowa applicable to the Bridge Company (Miller's Annotated Code of Iowa, Revised, 1888), provided, in Section 1061, that the "articles of incorporation must fix the highest "amount of indebtedness or liability to which the "corporation is at any one time to be subject, which "must in no case * * * exceed two-thirds of "its capital stock."

Section 1077 provided that "A statement of "* * * the amount of the indebtedness of the "corporation in a general way, must also be kept "posted up" in the principal places of business of

the corporation– not published in newspapers, as required by the Nebraska law.

There was no provision similar to that of Section 142 of the Nebraska Act (*supra*) exposing the corporation to forfeiture of its franchises for violation of these provisions.

The statement on this point in appellants' brief in the Court of Appeals: "*The laws of Iowa are identical with those of Nebraska*" is erroneous (Brief on Facts, p. 59).

While the Bridge Company had executed a mortgage to the Manhattan Trust Company on September 1, 1890, to secure its bonds to be issued to the amount of $1,500,000, only $500,000 of such bonds had been certified by the trustee, and there is no evidence to show that any of these were actually sold or delivered by the Bridge Company for any consideration moving to it; while it does appear that so late as August, 1892, Garretson was vainly endeavoring to sell them (1009). Several months later, on the appointment of the appellant as assignee of the Union Loan and Trust Co. of Sioux City, he found $400,000 of the bonds in its office, but no entry, document or other evidence to show that they had ever been actually issued, or that the Trust Company had acquired any interest therein (Hubbard, pp. 925-6; p. 933). Furthermore, the Iowa statutes, Sec. 1061, *supra*, excluded from the operation of the limit, debentures or *bonds of any company incorporated under the provisions of Chapter 1 of Title IX., the payment whereof are secured by an actual transfer of real estate securities in an equal amount, which are first liens on unincumbered real estate;* so that notes secured by first mortgage railroad bonds to a greater amount might fairly be regarded as within the equity of that statute.

Finally, the Supreme Court of Iowa, in construing Section 1061 had held that a private corporation was liable, at least to the extent of the consideration received, for an indebtedness contracted in ex-

cess of the limit imposed by the articles of incorporation: that in such case the corporation was estopped from setting up the limit.

See *Humphrey* v. *Patrons' Assn*, 50 *Iowa*, 607.

Garrett v. *Burlington Plow Co.*, 70 *Ia.*, 697.

Warfield v. *Marshall Co. Can. Co.* 72 *Ia.*, 666.

It is thus apparent why it was preferable to the lender to make the $1,500,000 loan to the Bridge Co. rather than to the Railroad Co. As the stock and bonds in both companies were owned by Garretson and his associates, who were asking the loan, and the purpose of the loan was stated to be (1) to take up the $1,000,000 loan with which Garretson and his associates *had acquired* the Sioux City, O'Neill & Western bonds; and (2) *to apply towards the construction of the bridge of the Pacific Short Line Bridge Co.*, it was most natural that the transaction should take the form of a loan to the Bridge Co.

Upon his examination on behalf of the petitioner, GARRETSON testified as follows:

"Q. Do you know for what purpose this $1,500,000 was raised?

"A. It was raised for the purpose of taking up the one milion dollar loan maturing Dec. 2 (*sic*), and of getting additional funds with which to carry on the construction of the bridge to a point where we could get money from the bonds of the bridge to complete it.

"Q. With whom did you negotiate all the terms of that loan?

"A. J. Kennedy Tod & Co. are the parties that negotiated it * * *

"Q. Were there any terms of it agreed to with any other parties except them?

"A. My memory is that the details of the loan

were agreed to with them, and a skeleton of all the facts pertaining to the loan was given to counsel to prepare the loan papers.

"Q. Do you know what counsel?

"A. Yes, sir; Strong and Cadwalader prepared the papers.

"Q. How and by whom was the Union Debenture Company introduced into the transaction?

"A. As we approached the close of the negotiations the question of the loan being made by a corporation and to be made by the Union Debenture Company was brought up.

"Q. By whom was it brought up?

"A. By Mr. J. Kennedy Tod. He stated that the company furnishing the money would be the Union Debenture Company, of some point in New Jersey, and he asked if we had a corporation here that could become possessed of these securities, formally, and make the papers, the loan papers. Whereupon, after a little consideration, I suggested the Pacific Short Line Bridge Company, an incorporation in existence here which could do that; that company, inasmuch as it was ruined financially, the bridge would be built by a new company other than the old corporation, and the Pacific Short Line Company could act as the corporation to receive these securities and to make the obligations, which was finally assented to.

"Q. Do I understand you to say that you told him that the Pacific Short Line Bridge Company was ruined financially; is that what you just said?

"A. Yes, sir; that is to say, the company had judgments against it, and was unable to pay them; and its securities had in former years been hawked about by the parties then connected with the corporation, and its credit both at home and abroad was ruined; and the necessity for a new corporation was absolute.

"Q. You say that you told this to Mr. Tod?

"A Yes, sir; I say that I said to Mr. Tod, in substance, that we had this corporation, and mentioned

its condition and the reason why it could be used" (pp. 734–5).

Mr. J. KENNEDY TOD testified on these points as follows:

"Q. Is it true that Mr. Garretson suggested to you that the Bridge Company should make the loan?

A. It is not, to the best of my recollection. Mr. Garretson was in the West, and the suggestion was telegraphed to him, I believe, at my suggestion.

Q. Is it true that Mr. Garretson informed you that the Bridge Company had judgments against it, and was unable to pay them?

A. That is wholly, completely absolutely and entirely false.

Q. And is it true that he told you that its credit both at home and abroad was ruined?

A. That is false.

Q. And is it true that he stated that the corporation, the Bridge Company, could be used for this purpose from the fact that it was necessary to organize a new bridge company, or one had already been organized from the fact that the old corporation was insolvent and had judgments against it, and it could not be used as a proper corporation for the construction of the bridge?

A. That is false * * *

Q. Did you have any knowledge at that time that it was proposed to organize a new corporation to build the bridge?

A. No.

Q. Had you any knowledge at that time that the Pacific Short Line Bridge Co. was insolvent?

A. I had not" (p. 1317).

Mr. Tod's testimony was corroborated by the production of a telegram from his attorneys, Messrs. Strong & Cadwalader to A. S. Garretson, dated December 21, 1892, reading as follows:

"On examination find Railroad Co. cannot lawfully make notes, present indebtedness being almost

to limit. Tod suggests Bridge Co. do it and we can prepare papers on that theory. Who are officers of Bridge Co.? Please arrange have directors of that Co. meet to pass resolutions we will send and you should have on Saturday."

When this telegram was shown to Garretson he expressed himself as surprised at its contents, and the best explanation he then could give of the matter was that his understanding had been with Tod & Co., rather than with Strong & Cadwalader, as to the corporation which should make the paper (p. 793).

The inherent absurdity of Garretson's version is also in its disproof. Tod & Co. were going to sell the notes to their customers; and while, as J. K. Tod testified, "I relied upon the collateral tendered "as security for the loan, which consisted in bonds "payable to bearer, and stock * * * tendered "in the name of the owners, endorsed in blank by "them" (p. 1457), and considered the collateral ample security for the loan, and, therefore, it did not make much difference who was the forma-maker of the loan (p. 1317); still it is incredible that a shrewd banker should make a large loan, however well secured, upon the notes of a corporation known to him to be "ruined financially," which "had judgments against it and was unable to pay them," and whose "credit both at home and abroad was ruined" (p. 734), even if he was going to keep the loan as an investment on his own account, still less when he was intending to sell the notes to his customers.

Appellant in his brief on facts says (at p. 55): "Strong & Cadwalader (Mr. Wickersham's firm), "counsel for both the Manhattan Trust Company "and Tod & Co. (P. R., 476) *knew of the judgments "against the Bridge Company* (P. R., 1613-4)."

The statement is most disingenuous. It was shown in evidence that the only judgment recorded against the Bridge Company was in favor of one

Neir, and that *prior to the transaction of December, 1892, it had been settled by the payment to Mr. Neir of the amount due on the judgment by Garretson*, and an assignment of the judgment executed by Nier to Sooy-Smith & Company (p. 1445), who were contractors for the sub-structure for the bridge (p. 1249). Mr. Sooy-Smith testified that the claim was assigned to him, and he was paid the amount thereof, either by the Bridge Company, or by crediting the amounts to him in the account; so that the claim was satisfied, and he understood it was discharged as an obligation on the bridge (pp. 1444–5, 1448–9).

C. L. Wright, the appellant's partner, testified that he and Mr. Garretson had accomplished the settlement of that claim, and that Strong & Cadwalader were informed that it had been settled, although he could not tell from memory exactly when (p. 1613).

W. H. Goodwin, vice-president of the Bridge Company, testified that the claim was paid *previous* to December 26, 1892, and that at that date *no creditors of the Bridge Company were harassing or pressing it* (pp. 1249, 1272–3).

Garretson testified that some $600,000 had been expended upon the work of constructing the bridge when the work was stopped (p. 781).

In March, 1893, Messrs. J. Kennedy Tod & Co., under the authority of Article Third of the INDENTURE OF TRUST (p. 637), at the request of Garretson (Ex. 14, p. 658), and being satisfied "that the remaining securities transferred thereunder were "sufficient security for the payment of the principal and interest of the said notes, and that it was to "the interest of the properties represented by the "securities pledged and deposited thereunder so to "do," released and redelivered to E. T. Nichols, treasurer of the Great Northern R. R., 3,600 shares of the Sioux City and Northern Railroad stock, which Garretson had sold to the Great Northern Railway Company for $350,000 cash (pp. 425–6; pp. 432–3; Ex. No. 2, p. 644). Of this sum,

$200,000 was received by Tod & Co. for Garretson's account between March 3d and 27th, and paid over by them to Garretson on his drafts (Ex. 56, p. 1027), and the balance, $150,000, was paid by Mr. Nichols to the Hanover National Bank of the City of New York for Garretson's account, and on production to Tod & Co. of vouchers showing such payment they delivered the 3,600 shares of stock of Mr. Nichols, and so advised Garretson (Ex. 50, p. 1019).

W. S. Tod testified that when this stock was released his firm supposed that the proceeds of the sale was to be applied towards the construction of the bridge (p. 431). As a matter of fact, the evidence showed that the entire proceeds of the sale were paid by Garretson to the Union Loan and Trust Company of Sioux City with instructions to apply the same in payment of notes of the "Railroad Syndicate," hereafter referred to, endorsed by the Union Loan and Trust Company (p. 778).

Default in payment interest on notes.

THE INTEREST ON THE $1,500,000 BRIDGE CO. NOTES, ENDORSED BY GARRETSON, WAS NOT PAID WHEN IT BECAME DUE ON JULY 1, 1893. The notes were presented at the office of J. Kennedy Tod & Co. for payment of the interest, which was not paid (pp. 1357–1321).

Request to declare principal due.

After such default had continued for more than thirty days, a majority of the note holders delivered to J. Kennedy Tod & Co., as trustees, a request in writing, which was produced by J. K. Tod and offered in evidence marked Defendant's Exhibit, 116 (p. 1513), which represented to the said trustees that default has been made in the payment of interest upon all of said notes which became due and payable July 1, 1893; that said default had continued for thirty days, and requested the said trustees to exercise the option in said notes and said Trust Agreement conferred, by declaring the principal of all the notes secured thereby to be immediately due and payable and to proceed forthwith to sell the

bonds and stock constituting the security for such notes as provided in said Trust Agreement.

When such paper was delivered, the interest on the notes had not been paid (p. 1321).

J. Kennedy Tod & Co., as trustees, thereupon signed a paper dated August 25, 1893 (Deft's. Ex. 117, p. 1513), addressed to the Pacific Short Line Bridge Company and A. S. Garretson, which, after reciting the default in payment of interest on the said notes, and the request by the holders of one-half in amount of the notes outstanding, proceeded:

Declaration of principal of notes due.

"We, J. Kennedy Tod & Co., trustees as aforesaid, pursuant to the provisions and authority in the said notes and said Trust Agreement conferred upon us, do hereby declare the principal and interest of all of such notes of the several series now outstanding to be immediately due and payable; and on behalf of the holders of said notes, we hereby demand immediate payment of the principal sum of $1,500,000, the aggregate amount of said notes, together with interest thereon from the 30th day of December, 1892.

"(Signed) J. KENNEDY TOD & Co., Trustees."

Three copies of the said notice were on August 26, 1893, deposited in the post office in the City of New York, in postpaid envelopes, one addressed to "Arthur S. Garretson, Sioux City, Iowa," one to "Pacific Short Line Bridge Company, Sioux City, Iowa," and the third to "Arthur S. Garretson and the Pacific Short Line Bridge Company, Sioux City, Iowa" (Ex. 118, p. 1514), as provided in the Indenture of Trust (*vide supra*, p. 27).

Transfer of S. C. & N. Stock to Tod & Co.

On August 23, 1893, J. Kennedy Tod & Co. forwarded the certificates of Sioux City and Northern Stock held by them as collateral under the Indenture of Trust aforesaid, to Sioux City for transfer to them, pursuant to the provisions of Article Fourth of said Indenture (p. 1351) and ON SEPTEMBER 1ST, 1893, the transfer was effected, and new certificates

issued in the names of J. Kennedy Tod & Co., and returned to them (p. 1609).

Notice of Sale.

The said trustees thereupon proceeded to advertise notices of a sale of the bonds and stock constituting the trust for the security of said notes, to be had on September 19, 1893, by publishing a notice of such sale "not less than once a week for two weeks in two daily newspapers published in the City of New York, and in one daily newspaper published in Sioux City, Iowa" (Art. Fifth, Ind. of Trust, *supra*, p. 27), viz., in the New York *Evening Post* and in the New York *Times* on September 4th, 7th, 8th, 11th, 15th and 18th, and in the Sioux City *Journal* on September 4th, 11th and 18th.

The sale was adjourned, *at the request of the counsel for the appellant* until September 26th, and although the trust deed provides that "the trustees may, from time to time, adjourn such sale or sales in their discretion by public announcement at the time and place of sale so fixed, *without further publication of notice*," notice of such sale as so adjourned, *was published* in the New York *Evening Post*, on September 23d and 25th, 1893, in the New York *Times*, on September 22d and 26th, 1893, and in the Sioux City *Journal* on September 20th, 1893 (pp. 1357-8, Exh. 129 to 134, 1534-1540).

The notices were in the following form:

NOTICE OF SALE.

NOTICE is hereby given that, pursuant to the terms of a certain trust agreement between A. S. Garretson and the undersigned, as trustees, dated December 31, 1892, we shall sell at public auction, at the Real Estate Exchange & Auction Room, Nos. 59 & 61 Liberty St., in the City of New York, by Richard V. Harnett & Co., Auctioneers, on Tuesday, the 19th day of September, 1893, at 12 o'clock, noon, the follownig securities, held by us under said trust agreement as security for the payment of the principal and interest of certain promissory notes described therein viz.:

10,600 shares of the capital stock of the Sioux City & Northern Railroad Company, of the par value of $100 each, and

2,346 of the first mortgage 5% gold bonds of the Sioux City, O'Neil &

Western Railway Company of the sum of $1,000 each, with coupons for payment of semi-annual interest from and including April 1, 1893, to the maturity of the bonds attached thereto.

Terms will be announced at the time of sale by the auctioneer.

Dated New York, August 29, 1893.

J. KENNEDY TOD & Co., Trustees.

STRONG & CADWALADER, Attorneys,
36 Wall Street, New York.

The above sale has been adjourned until Tuesday, September 26, 1893 at 12.30 P. M., at the same place designated in the foregoing notice.

New York September 19, 1893.

J. KENNEDY TOD & COMPANY, Trustees."

Sale of Securities.

The said securities were sold pursuant to the notices aforesaid, on September 26, 1893, at public auction, at the Real Estate Exchange and Auction Room, Limited, by Richard V. Harnett & Co., auctioneers (pp. 1398–9).

They were sold in one lot, and bought by J. Kennedy Tod & Co., purchasing trustees, for the sum of $1,000,000, that being the only bid offered (pp. 1395–6). The sale was held in a large auction room where auction sales are ordinarily held, on the regular stock sales day; and the auctioneer testified that quite a number of people were present, and the sale was cried out in the usual way (pp. 1395–7).

Tod & Co., Purchasing Trustees.

Tod & Co. had been requested by the note-holders to act as purchasing trustees pursuant to Article Eighth of the INDENTURE OF TRUST aforesaid, and after the sale, all of the $1,500,000 of notes were turned into J. Kennedy Tod & Co.'s hands, and certificates of interest in the collateral purchased, issued by them in exchange therefor (Ex. 135, p. 1539). Such certificates recite that Tod & Co. as Purchasing Trustees under a certain Indenture of Trust between A. S. Garretson and J. Kennedy Tod & Co., trustees, dated December 31, 1892 * * *

Certificates of Interest.

" have purchased at a sale had pursuant to the terms of said Indenture, " and now hold for the equal benefit of the holders aforesaid " the securities (describing them) and that " the holder or owner hereof having de- " posited with the undersigned one of such notes of $5,000 is entitled to " the one equal three-hundredth part interest in the above described se-

" curities and in a claim against the Pacific Short Line Bridge Company "and A. S. Garretson for $500,000, being the deficiency arising on the "sale of the said securities, with interest and expenses, etc., to be here- " after ascertained."

(Ex. No. 135, p. 1539).

The said certificates were issued from time to time as the notes were brought in after the sale (pp. 1358-1387). They were issued in form to "Bearer." Messrs. W. S. Tod and J. Kennedy Tod both declined to give the names of the parties to whom they were issued, further than they were revealed in the various papers in the evidence, unless the Court should so direct, on the ground that they did not feel at liberty to do so without consent of the parties, it being a private matter between bankers and their clients, and which the clients might object to have revealed (p. 1388). After such sale the 10,600 shares of Sioux City and Northern stock were transferred on the books of the company from J. Kennedy Tod & Co., and new certificates issued on October 4, 1893, in the name of "J. Kennedy Tod & Co., purchasing trustees" (p. 1608).

Transfer of S. C. & N. Stock to Tod & Co., Purchasing Trustees.

Messrs. J. Kennedy Tod & Co. at the date of the commencement of this suit held and now hold the 2,340 Sioux City, O'Neill and Western bonds of $1,000 each, payable to bearer, and certificates for 10,600 shares of Sioux City and Northern stock in the name of J. Kennedy Tod & Co., purchasing trustees, and also the 300 notes of $5,000 each of the Pacific Short Line Bridge Company, endorsed by A. S. Garretson, which were surrendered by the owners thereof in exchange for the said certificates of interest in said securities.

Origin of this controversy.

Formation of Railroad Syndicate.

In 1889 A. S. Garretson, together with Messrs. Hedges, Hornick and Haakinson, who united with him in the execution of the agreement with the Bridge Company (Ex. 36, p. 1494, *supra*) and one

James E. Booge, associated themselves together under a written agreement (Petr.'s Ex. 1, p. 941) for the purpose of building and equipping the Sioux City and Northern Railroad, and later extended their operations to the Nebraska and Western, now the Sioux City, O'Neill and Western Railroad.

This partnership is spoken of throughout the testimony in this cause, and in the briefs of counsel as "the Railroad Syndicate," and the notes issued by them or any of their members as "Railroad Syndicate paper."

Their original agreement provided as follows:

"That should it be thought best for one member of the parties hereto "to make contracts for materials, or to execute notes for borrowed "money, all such contracts and all such notes so executed by a single "member hereof for purposes herein expressed shall be the obligations of "each one of the parties to this contract, and each one hereto shall be "equally liable therefor. All borrowed money to be placed to the credit "of John Hornick, Trustee, at the office of the Union Loan and Trust "Co., and all moneys paid out to be paid out upon the order of said John "Hornick, Trustee, and vouchers to be taken therefor" (p. 942).

Incorporation Union Loan and Trust Co.

GARRETSON, HAAKINSON and BOOGE were among the original incorporators of the said UNION LOAN AND TRUST COMPANY (p. 1623), which GARRETSON had been largely instrumental in organizing in 1885 (p. 689). That company started with a capital of $100,000. The purposes of its incorporation, as stated in its certificate of organization, were:

"The loaning of money on real estate security; the loaning of money "also on collateral, and other personal property security; the purchase "and the sale of mortgages; the purchase and the sale of municipal "bonds and other securities, and of such real and personal property as "shall be desirable, for its own use or profit, or necessary for the collec- "tion or security of any debts or claims owing to the company, or in "which it may have an interest; the negotiation of loans; the acceptance "and execution of such trusts as may be committed to it by any indi- "vidual, company, or corporation, or court of record. *However, this "company shall not purchase nor loan its funds on the securities of any "railroad company.*"

(Petitioner's Exhibit 90, pp. 1071–2).

The capital was increased from time to time until January 18, 1889, when it reached $1,000,000 (p.

1092). Garretson was vice-president and one E. R. Smith secretary and treasurer of the company throughout its corporate existence. In its early history it made loans on real estate, sold mortgages, issued and sold debentures and loaned money to jobbers, packers and manufacturers. In 1889 it commenced the sale and discount of the notes made by or on behalf of the "Railroad Syndicate" in the course of its operations.

Failure of Union Loan and Trust Company.

On April 25, 1893, the said trust company made an assignment for the benefit of its creditors to E. H. Hubbard, Esq., a member of the firm of Wright & Hubbard, of Sioux City, having, as it subsequently appeared, a very large amount of indebtedness outstanding, running up into millions of dollars, a large portion of which was represented by the notes of various individuals and corporations, bearing the endorsement of the said company, which had been purchased by some three hundred and forty banks, largely in the East, allured by the offer of 7½ and eight per cent. interest. These banks, not having taken pains to inquire before the failure what was back of the high-sounding name "Union Loan and Trust Company," found themselves in a situation to charge off considerable amounts to profit and loss (p. 1057). It thereupon occurred to the ingenious minds of some of their advisers that they who had advanced their money without security, might possibly recoup their losses at the expense of those who had been careful to get good collateral in negotiable form before parting with theirs, and accordingly, looking about for a field of enterprise in this direction, it was determined to make an effort to get something from J. Kennedy Tod & Co., who apparently held the only securities of any value which Garretson and the other Sioux City people who had been interested in the Union Loan and Trust Company had owned.

Some time in July, 1893, therefore, an individual called at the office of J. Kennedy Tod & Co. in the City of New York with a note introducing him

as a Mr. J. C. Coombs, a lawyer from Boston, and had a brief interview with Mr. W. S. Tod, in which it transpired that the caller was counsel for a committee of some of the creditors of the Union Loan and Trust Co., and that he was engaged in some efforts in their behalf (pp. 505-7, 1378-81). Coombs' negotiations with Tod.

Following that interview on July 30th Mr. Coombs wrote to Tod & Co. stating that he had been in Sioux City and Chicago with the lawyers of the committee of creditors, and had submitted the outline of a proposition for adjustment which had been committed to him for carrying out, if possible, and which "contemplates a disposition of your claim, "which I think would be satisfactory and in some "respects attractive to you" (p. 682).

Shortly after that, he again called at their office and saw Mr. J. Kennedy Tod and had a brief interview with him, in which he made application for an extension of the time of sale of the collaterals to the $1,500,000 loan, which had been advertised for September 19th. Just before this interview he had written, under date of August 19th, stating that he had completed his preparations and investigations and was going to Chicago to advocate an attempt to carry through the reorganization which he had proposed, and that "*if the plan is adopted, I should* "*be able speedily to ask you to* LEND *the new asso-* "*ciation money sufficient to pay the interest, when* "*with but little delay, the company would be able* "*itself to pay you the* INTEREST *in cash*" (pp. 681-2).

On August 23d, Tod & Co., with an instinct of distrust more than justified by subsequent events, had written to Coombs, stating: "There can be no pos- "sible misunderstanding about the fact that in all "matters you are acting on your own responsibility "so far as we are concerned, and further that no "arrangement or private understanding exists be- "tween us. We will be very glad to hear of the re- "sult of any of your efforts, but while we will ap- "preciate your kindness in writing to us, we will "not feel that it entails upon us the responsibility

" of advising you as to anything which we may do " or intend to do. *Our desire is to recover our " money with interest and expenses. We have no " other purpose*" (p. 679).

At Mr. Coombs' request, and upon his representation that he hoped to raise enough money to pay the interest due on the $1,500,000 on July 1, 1893, Messrs. Tod & Co. had the sale of collateral, which had been advertised for the 19th, postponed until the 26th.

Attempt to Compromise.

On September 25th, Mr. Coombs, accompanied by sundry gentlemen, whom he introduced as a committee of creditors of the Union Loan & Trust Co., called at the office of J. Kennedy Tod & Company, stating that they were prepared to pay the interest on the loan due July 1st, *but that as a condition precedent to such payment they must be given the places of the majority of the directors of the Sioux City & Northern Railroad.* Mr. Tod replied that he was unwilling to accede to this; that it was too soon for them to ask the control; that after they had paid some of the principal of the loan would be time enough for that, but that he certainly would not concede to them the control of the Board of Directors *merely upon the payment of the overdue interest;* that he was willing, however, to give them one or two places on the board and to let them have access to everything that was being done. This was not, however, satisfactory to Mr. Coombs and his committee, and they withdrew *without having paid the interest, or principal, and without having made tender of one single dollar* (pp. 509-527), although they subsequently showed in evidence in this cause that they had at their disposal a fund large enough to have paid the interest (pp. 868-872; 583-5).

At the time of this interview, creditors of the Union Loan & Trust Company to the amount of about $2,000,000 only, had contributed to the fund which was collected by the committee, and Mr. Plumer testified that he was acting as chairman and

Mr. Coombs as counsel OF THE COMMITTEE O THOSE CREDITORS WHO HAD SO CONTRIBUTED (p. 883

A great deal of testimony has been introduced on behalf of the intervenor about this interview, and voluminous affidavits and statements have been prepared concerning it, and, in fact, this lawsuit is largely built up on Mr. Coombs' and his clients' account of what there transpired. We do not consider that any further statement than has been here given is material regarding what was at most *an unsuccessful effort to compromise a claim*, and which Mr. King, one of the committee, testified he understood at the time was *an effort to compromise or adjust a claim* (p. 588).

Later, on the day of this interview, Mr. Plumer delivered at the office of Tod & Co. a paper marked Exhibit A, annexed to defendant's answer, stating: "As Chairman of the Committee of Creditors of the "Union Loan and Trust Company of Sioux City, "and allied insolvent concerns, and in behalf of the "assignee and receivers, *we deny your title and "right to possession of and power of sale over said "securities*, and hereby protest against any such "sale, and demand that said securities be surren- "dered by you to Mr. Hubbard, of Sioux City, as- "signee of the Union Loan & Trust Company. "Further, if otherwise you might have had any "right to dispose of said securities, still *in view of "your refusal to accept the over-due interest on the "loan for which you claim to hold said securities "as collateral, except on condition that you be con- "tinued in the management and control of the prop- "erties involved*, we also deny your right to fore- "close the equity of redemption in said securities "by such sale or otherwise. I give this notice with "the expectation that it will be adopted and rati- "fied by Mr. Hubbard as his act and as proper pre- "caution in view of his absence and the unexpected "termination of our negotiation this morning" (p. 66).

It will be observed that the notice carefully refrains from making any statement of *facts* on which the signers take it upon themselves to deny the defendant's right of sale and that it *misstates* the action of the parties by alleging that the defendants refused to accept the overdue interest, *except* on condition that they be continued in the management and control of the properties, whereas the committee had *offered* to pay the interest if *they* be given control of the properties.

The purpose of this effort to get control of the Sioux City and Northern Railroad Company appears in the circular letter which the COMMITTEE had issued to the creditors of the Trust Company, under date of September 1, 1893, viz.:

"We propose, however, to go on in the formation of a new corporation, to be called, for instance, the Commutation Trust Company, which corporation, if it can place the bridge bonds, as now seems probable, will ask Sioux City to make an appropriation of $400,000 to aid in the completion of the bridge, and on these terms will agree to finish it. *These bridge bonds are to be guaranteed* by both the Sioux City, O'Neill and Western Railroad Company and the Sioux City and Northern Railway Company, and as only $1,000,000 are to be issued, as against the former proposed issue of $1,500,000 they should be good bonds" (pp. 1058-9).

Messrs. J. Kennedy Tod & Co. not being prepared to have the value of the securities held in trust by them destroyed by permitting the Sioux City and Northern R. R. Co. to guarantee $1,000,000 bridge bonds for the creditors of the Union Loan and Trust Co., very wisely declined to accept the committee's conditional offer, and no facts being stated in the notice putting them upon any further inquiry, they caused the securities to be sold at public auction on September 26, 1893, as advertised, *Mr. Coombs and Mr. Plumer being present at the sale* and making no objection to the manner of conducting the same (p. 881).

On October 5, 1893, the intervening petition was filed in this cause, together with sundry affidavits upon which Judge Shiras granted an order restraining the defendants from selling or otherwise disposing of any of said 10,600 shares of Sioux City and Northern stock, or any of the 2,340 Sioux City, O'Neill and Western bonds until the further order of the Court (p. 70).

Affidavit of J.C. Coombs.

Among these affidavits was one of J. C. Coombs, the senior counsel in this cause, which he afterwards *offered in evidence* as a part of the proofs on behalf of his clients (p. 940), and which although objected to on behalf of the defendants upon the grounds, *i. e.* :

> " that it is not competent for counsel not only
> " to make his own lawsuit, by putting it in
> " the form of an affidavit, and then seek to
> " introduce it in evidence in the case without
> " tendering himself as a witness, and as an un-
> " heard of method of trying a lawsuit" (p. 941).

was made a part of the record upon which the Court below considered the case. Some sense of its impropriety seems at a late date to have penetrated the counsel's conception of professional proprieties, as he requested the Clerk of the Circuit Court of Appeals not to include it in the portion of the record to be printed for that Court (p. 3).

The affidavit exhibits the affiant as so eager to find some peg on which to hang his lawsuit, that after urging Mr. J. J. Hill to use his influence with Mr. Tod to delay the enforcement of his rights under the loan agreement until Mr. Coombs should have time enough to work up his organization and get it in position to *borrow* some money from Messrs. Tod & Co. with which to pay their interest (*vide supra*, and pp. 681-2), he resorts to spying upon Mr. Hill's movements in order to procure material for an affidavit, and so he deposes that " he," Mr. Hill, " said he would see them," Tod & Co., " and would ' tell me the result later in the day, and he went to

" their office where he held a very long consultation " with them, *as I could see from an office looking* " *into the windows of their own*, and when he came " back, *I thought* he was more reticent than he had " been, and to my urgent inquiry as to where we " stood, said he guessed that J. Kennedy Tod & " Co.'s interests were rather administrative than " personal" (pp. 1161-2)—which was true. After this exhibition, it is not to be wondered that in his desperate efforts to put the defendants into the position of *mala fide* holders, the appellants' counsel should resort to the pleasant and professional effort of demonstrating that one of the counsel for Messrs. Tod & Co. having also been of counsel for the Manhattan Trust Company, must have had knowledge of the alleged misdeeds of officers of that company, behind which Garretson sought to shield himself for his own wrongdoing, and that this alleged knowledge was imputed to the defendants (Appellant's Brief on Facts, pp. 43-45).

The alleged interest of Union Loan and Trust Company and its assignee in securities in controversy.

Alleged Interest of Union Loan and Trust Company and its Assignee.

The alleged interest of the Union Loan and Trust Company which is claimed to give its assignee the right to challenge the defendants' possession of the securities in controversy, as set forth in the AMENDED PETITION, is as follows. It is alleged that the Union Loan and Trust Company, soon after its incorporation,

" engaged in the discounting of short time or business paper on the se- " curity of the collaterals furnished it by the makers thereof, and of pro- " curing said paper to be rediscounted by banks and bankers in other and " for the most part Eastern States, and purported to secure the payment " thereof by its endorsement thereon.

" 4th. That to induce said banks and bankers to rediscount said paper, " said Union Loan and Trust Company was accustomed to represent to " them that it was amply secured for its own protection by the deposit " of collaterals with it, by the makers of said paper to secure the pay- " ment thereof, and that relying upon said collaterals and thus protected

" it was warranted in making the indorsement aforesaid, and that while " its own indorsement upon the paper was ample security therefor, yet " the representation also implied that the holder or taker thereof was " also protected by the alleged collaterals so represented by said Union " Loan and Trust Company to have been received by itself from said " obligors."

5th. That one A. S. Garretson was Vice-President of the said Trust Company, and exercised a more active control over its affairs than any other of its officers or directors, and that he associated himself with the other members of the Railroad Syndicate, with the plan and purpose to procure notes which were to be furnished by members of said Syndicate to be discounted by and through said Union Loan and Trust Company, upon the representation to other banks and bankers as aforesaid, the proceeds whereof should be credited on the books of the said Union Loan and Trust Company to John Hornick, trustee, and expended in the construction and acquisition of railroad properties, which properties, and all and every form or representation of title and interest therein were on the understanding and agreement of said Syndicate and the said Union Loan and Trust Company to be and remain in whatever form or priority of title the same might assume, as collateral security for the payment of the notes to be discounted and negotiated as aforesaid, and any balance or surplus of values in said properties were to belong to said Railroad Syndicate for their joint and equal use and benefit (pp. 139–40).

In his "Brief and Argument on the Law" in the Court of Appeals, the appellant stated his claim as follows:

"The Union Loan and Trust Company was entitled to a first lien upon and right to possession of all the properties acquired with the proceeds of syndicate paper and of all the securities, stocks and bonds of any incorporated companies in which said property might be vested and which securities should be issued for or on account of such property. *This was so because such was the agreement between the Union Loan and Trust Co. and the Railroad Syndicate*" (p. 2).

"In addition to the lien by contract * * * the " Union Loan and Trust Company was further en- " titled to a first lien upon and right to possession " of all the securities in controversy, *because the* " *said securities were actually deposited with the* " *said Union Loan and Trust Company, as col-* " *lateral security for its continuous endorse-*

"*ment of syndicate paper*, and as collateral "security in trust for the benefit of whosoever "might be or become the purchasers of this con- "tinuous line of syndicate promissory notes so "negotiated by and through said Trust Company "and as the only fund contemplated or provided "for the payment of this continuous syndicate in- "debtedness through the said Union Loan and "Trust Company" (p. 5).

Evidence in support of alleged lien of Union Loan and Trust Company.

Evidence in support of alleged lien.

TO SUBSTANTIATE THE EXTENSIVE CLAIMS THUS FORMULATED, THE PETITIONER HAS NOT PRODUCED ONE SCRAP OF PAPER. So far as *records* disclose anything, there never was a pledge to the Union Loan and Trust Company, nor any agreement to pledge anything as security for the "railroad syndicate" paper which the Union Loan and Trust Company discounted, endorsed or sold; and the representations made by Smith, the secretary and treasurer of the company, in the circulars which were scattered broadcast through the country, to the effect that "we handle no paper other than that of our regular customers. In every *case we hold good and sufficient security from the maker*" (pp. 1174-5) were absolutely false.

SMITH and his associates were therefore liable to criminal prosecution at the instance of any one who had advanced money to the Trust Company relying upon such false statements. He and Garretson came willingly from California to Sioux City to testify on behalf of the intervenor. Hedges came also, but, more timorous than the others, would not venture into Iowa, and so his deposition was taken in Omaha. Haakinson is a client of one of petitioner's counsel, who is also assignee for the benefit of his creditors; and Hornick evinced an extreme willingness to assist the petitoner in every way.

With these complacent witnesses at command, petitioner's counsel thereupon proceeded with what we venture to assert was one of the most amazing examinations ever submitted to a court in support of a claim to adverse right in valuable property. It consisted of the simple process of putting into the mouths of the witnesses the testimony desired to be elicited by the Examiner. In order that the Court may properly appreciate the full extent of this, which is the only evidence in the cause to support the claim that the Union Loan and Trust Company ever obtained any interest in the securities in controversy, it is necessary to reproduce the proceedings at some length:

Character of testimony.

A. S. GARRETSON was examined in behalf of the petitioner as follows:

Q. What was the security held by the Union Loan and Trust Co. for the paper negotiated of Hornick, the Sioux City Dressed Beef and Canning Co., the Union Stock Yards Co. and John Hornick?

Objected to as incompetent, immaterial and irrelevant, calling for testimony of a conclusion of witness' mind rather than for facts.

A. We put with the Union Loan & Trust Co. all of our railroad securities as we came in possession of them; and we withdrew from the Union Loan & Trust Co. various railway securities from time to time on which to raise money elsewhere. * * *

Q. *Well, the Union Loan & Trust Co. had what security for its endorsement in pursuance of this circular?*

Objected to as incompetent, immaterial and irrelevant, and involving a conclusion of the witness.

A. At what dates?

Q. At all times when the money was raised and credited to John Hornick, and charged to John Hor-

nick's account as trustee on the books of the Union Loan & Trust Co.?

Same objection.

A. I hardly know whether I can be more specific than I was in my former answer without having dates asked. I will reiterate this fact, however, that all of the securities, both bonds and stock, of the Sioux City & Northern Railroad Co. were *at one time or another* put in the Union Loan & Trust Co. as collateral for money borrowed there by certain members of the syndicate, and that a portion of the bonds of the Nebraska & Western Ry. Co. were put in the Union Loan & Trust Co. for money borrowed to help the people that were building the Nebraska road at the time they were constructing it; and that later on the stock of the Sioux City, O'Neill & Western Ry. Co. was in possession of the Union Loan & Trust Co. (pp. 696–7).

Q. Let me get at it in another way, Mr. Garretson; *were any of the properties or securities* acquired with the proceeds of the funds credited to John Hornick, trustee, *collateral security* held by the Union Loan & Trust Co. for the benefit of any holders, or for its own benefit, on endorsements of paper other than Railroad Syndicate paper.

Objected to as incompetent, immaterial, irrelevant, calling for a conclusion that the witness cannot possibly testify to of his own knowledge.

A. I think not.

Q. Let me illustrate. On the failure of the Union Loan and Trust Company would any of the proceeds of the notes that had been credited to Hornick, trustee, in the form of the railroad securities or property, be applicable for the payment of any of the notes of the Stove Works or Engine Works or other properties doing business through the Union Loan and Trust Company?

Objected to as incompetent, immaterial, irrelevant, as involving the witness' construction of the effect of contracts which might have been made, and therefore not competent evidence as against the defendants.

A. No, sir (p. 698).

Q. *Perhaps I can put it this way: Would the payment of any one note endorsed by the Union Loan and Trust Company, the proceeds of which had gone to the Railroad Syndicate, have at all diminished the liens of the Union Loan and Trust Company on the collateral, provided it had endorsed a new note to renew and take the place of the old one?*

Objected to as incompetent, immaterial, irrelevant, as involving a conclusion of the witness, and testifying to facts which must rest in some form of agreement with the company, and not in conclusions of the witness.

A. No, I think it would not.

Q. *In other words, whether or not the lien of the Union Loan and Trust Company was a continuous lien for a continuous endorsement of the same account?*

Same objection as last above.

A. Yes (p. 700).

E. R. SMITH was asked:

Q. Now what security did the Union Loan & Trust Co. have for the paper, the proceeds of which was credited to John Hornick, trustee?

Objected to as incompetent, immaterial and irrelevant, and calling for an opinion of the witness.

A. The stocks and bonds of the various railroads mentioned by me; the Sioux City Terminal Railway Co. was not originally an enterprise of the syndicate, but later became the property of the syndicate directly or indirectly, I don't know just how, except

through an ownership of its stock by the Sioux City & Northern (p. 824).

Q. What about any other securities—do you know where the stock and bonds of the Sioux City & Northern were?

Objected to as immaterial and irrelevant.

A. I know we had all of the stock and all of the bonds of the Sioux City & Northern Road in our hands as collateral to the loan made to the Railroad Syndicate (p. 826).

Q. You were the constant officer in charge of the Union Loan & Trust Co., were you not? A. Yes, sir.

Q. Was Mr. Joy there very frequently, the president? A. No, sir (p. 827).

Q. *I understand from your circular that the Union Loan & Trust Co. held the railroad securities of the syndicate as collateral to its endorsement?*

Objected to as leading and as immaterial, irrelevant and incompetent.

A. Yes, sir.

Q. Is that correct?

Same objection.

A. Yes, sir.

The further objection that the circular does not say anything of the kind, and it is a false assumption improperly put into the question (p. 828).

Q. Well, as the officer in charge of the Union Loan & Trust Co , *whether or not the Union Loan & Trust Co. had collateral security for railroad syndicate paper?*

Objected to as incompetent, immaterial and irrelevant and calling for a conclusion on the part of the witness' mind and for his construction of transactions which speak for themselves.

A. I did.

Q. I am asking the witness *whether or not it was his duty to* know that there was security in the office behind the endorsements of the Union Loan & Trust Co. made in pursuance of this circular?

Objected to as incompetent, immaterial and irrelevant, as not the best evidence; the duties of the officer are prescribed by the by-laws of the association and bylaw.

A. Yes, sir (p. 828).

[The answer is omitted in the printing.]

Q. Whether or not the Union Loan & Trust Co. received those securities as collateral for the purposes and in the manner I have stated.

Objected to as incompetent, immaterial, irrelevant, as not the best evidence; the duties of the officer are prescribed by the by-laws and by law; further, that it is wholly improper to ask witness such a question without asking him the facts; wholly improper to ask the witness a question as to the purpose for which the thing was received, and not the facts; as entirely an improper line of inquiry and unfair to everybody connected with the case. The fair inquiry would be to call for the fact and not ask the witness his conclusion or purpose. There has been no question asked as to the facts and this line of inquiry is a perversion of the facts in the case, in the absence of a magistrate to limit the inquiry.

A. Yes, sir (pp. 829–30).

Q. * * * I ask you again, now, as the officer in charge for the most part of the Union Loan & Trust Co. whether the collateral security which you say you held for the railroad—for endorsement of the Union Loan & Trust Co. on Railroad Syndicate paper *was a separable guaranty, or a continuing*

guaranty for continuing endorsements, and where paper was renewed?

Objected to as incompetent, immaterial, irrelevant, as calling for the construction by the witness of transactions concerning which there is no evidence, and as to which he has not been asked; and the previous objection as to the form of the question as being in the highest degree improper and a palpable perversion of every rule of evidence.

A. The question is a little bit vague to me. As I understand, you wish to know whether all of these railroad securities were placed there as collateral security on account of the endorsement of the company to secure the syndicate loan, whether a note due to-day or a renewal of it. If so, that is correct (p. 831).

Q. Were there ever any of the securities of the Nebraska & Western in the Union Loan & Trust Company *as collateral for Railroad Syndicate properties?*

Objected to as incompetent, immaterial, irrelevant, calling for a conclusion of the witness. If the securities were ever there as collateral or otherwise, there must have been some contract in evidence of it; and as not the best evidence.

A. Yes, sir.

Q. Can you tell me what securities, and when, of the Nebraska & Western; that is, have you any memory of them?

Same objection as last above.

A. We had, according to my memory, all of the stock and all the bonds of the Nebraska & Western Railway Company.

Q. Do you know when you had those?

Same objection.

A. We had them during the latter part of 1891. That is, the first we received was some time during July or August, 1891, and we received the balance of them during that same year, in the latter part of 1891 (p. 832).

Ed. Haakinson testified:

Q. Do you know what arrangement was made for the raising of money necessary for the construction and equipment of the Sioux City & Northern R. R.?

Objected to as irrelevant, immaterial and incompetent.

A. Yes, sir.

Q. You may state what that arrangement was?

Same objection.

A. The arrangement was Mr. John Hornick, trustee, was to issue notes to the Union Loan & Trust Co. to be sold through the Union Loan & Trust Co. *My understanding was that the proceeds were to be placed with the Union Loan & Trust Co. to the credit of John Hornick, trustee.*

Q. How were the notes to be, or how were they secured if you know?

Objected to as leading, calling for conclusion and not for facts, and as irrelevant, immaterial and incompetent.

A. They were to be secured by the stocks and bonds of Sioux City & Northern R. R. Co.

Q. Do you know whether all of the stock and all of the bonds of the Sioux City & Northern were placed with the Union Loan & Trust Co. as security?

Objected to as leading, calling for a conclusion, assuming a fact and as irrelevant, immaterial and incompetent.

A. No, I couldn't say that I do.

Q. Did you see any securities with the Union Loan & Trust Co.?

Objected to as irrelevant and immaterial.

A. I only saw the stock of the Sioux City & Northern that was issued in my name.

Q. Under what arrangement, if any, if you know, was that stock left with the Union Loan & Trust Co.?

Objected to as leading, irrelevant, immaterial and incompetent, because it calls for a conclusion and does not call for detailed facts and circumstances.

Q. State the facts.

Also objected to upon the further ground that following it up with the proposition to "state the facts" leaves it to the witness to determine what facts should be stated, instead of having the witness directed to any question regarding the detailed facts to be stated.

Q. State the facts fully.

Same objection.

A. *It was put there for the security of the John Hornick notes.*

Defendant's counsel objects for the reason that it is obviously a conclusion and obviously put in the form indicated in an improper question (pp. 906-7).

Q. What, if any, conversation did you have with E. R. Smith, then secretary of the Union Loan & Trust Company, in reference to the placing of that collateral there, and why it was placed there?

Objected to as leading, calling for a conclusion of the witness, irrelevant, immaterial, incompetent, also as calling for hearsay testimony.

A. I was notified by Mr. Smith that there was $287,500 of the Northern stock turned over to them

on my account, which they sent me a receipt for, I think. *I can't say for certain whether it was in the Union Loan & Trust Company office or somewhere else, but I saw the stock because I signed it on the back. I have not any recollection as to the place I saw it* (p. 907).

Q. What enterprises other than the Sioux City & Northern did the Railroad Syndicate finally take up as a part of their projects and work?

Objected to as irrelevant, immaterial and incompetent.

A. Well, the Sioux City, O'Neill & Western, and the Bridge and the Terminal property. The money for the Sioux City, O'Neill & Western enterprise was raised in the same manner as the money for the Sioux City & Northern. The notes were not all signed by John Hornick. I signed some of those notes (p. 908).

Q. Under what arrangement?

Objected to as leading, immaterial and irrelevant, hearsay and incompetent.

A. I was requested by Mr. Garretson, *the financial agent for the syndicate*. After I signed them I turned them over to E. R. Smith, secretary of the Union Loan & Trust Company (p. 908).

Q. And what was he to do with them?

Objected to as immaterial, irrelevant and incompetent.

A. He exchanged John Hornick's notes for my notes.

Q. What was he to do with these notes of yours that you turned over to the Union Loan & Trust Company?

Same objection.

A. He was to sell them and apply the proceeds to John Hornick's account as trustee for the railroad

syndicate. The money was to be credited to the John Hornick, trustee, account (p. 909).

Q. *Was there any security for those notes of yours?*

Objected to as immaterial, irrelevant, leading, calling for a conclusion and hearsay.

A. The same security that was given to John Hornick's notes.

Q. *What did it consist of?*

Same objection.

A. It consisted of the bonds and stocks of the various enterprises mentioned.

Q. Do you mean of the properties of the railroad syndicate?

Same objection.

A. Yes, sir.

Q. Was that true also as to any other notes that were placed in there by members of the syndicate or any of them—railroad syndicate notes?

Same objection.

A. Yes, sir (p. 909).

DANIEL T. HEDGES testified:

"Q. State whether or not, to your knowledge, if the Union Loan and Trust Company itself assumed any liability on these notes (*i. e.*, of parties to the syndicate, given to raise money to build the Sioux City & Northern R. R.)?

Defendant's counsel objected as irrelevant, incompetent and immaterial, and not the best evidence.

A. *It was understood that the Union Loan & Trust Company would endorse his notes.*

Objected to as being a statement of the witness and not of the facts.

Q. State whether or not there was any agreement in respect to any security for those endorsements?

Objected to as incompetent, irrelevant and immaterial, and as leading.

A. Yes, sir.

Q. You may state what it was. Was it in writing?

Objected to as irrelevant, incompetent and immaterial.

A. It was agreed by the syndicate *with Mr. Garretson* that the securities that were to be received by the syndicate were to be placed with the Union Loan and Trust Co. as security to them, or for them, until all the debts of the syndicate were paid; *until all the securities were sold and the debts were paid* (p. 1696).

Q. Do you know—did you have any understanding as to what was the form of the account with the Union Loan and Trust Company, was to be?

Defendant's counsel objected as incompetent, irrelevant and immaterial--the witness' understanding is not competent testimony.

A. It was agreed *by the syndicate with Mr. Garretson* that the proceeds should be placed to the credit of John Hornick, trustee for the Union Loan and Trust Company. Mr. Garretson was a member of the syndicate; he was also president of the Union Loan and Trust Company, and spoke for them as well as for the syndicate.

Defendant's counsel moves to strike out the words beginning with "and spoke for them" as conclusions of the witness and not facts (p. 1697).

That the Railroad Syndicate went into another enterprise besides the Sioux City and Northern Railroad, viz., the Nebraska and Western, the Terminal and the Bridge Company.

Q. How was the money for these enterprises to be raised?

Defendant's counsel objects as immaterial, irrelevant and incompetent, and as calling for agreements or understanding between parties other than the parties in this proceeding.

A. It was to be raised the same as for the Sioux City & Northern (p. 1697).

Q. *What security, if any, was the Union Loan & Trust Company to have for the money?*

Same objection and leading.

A. The securities for the amounts were to be placed with the Union Loan & Trust Company as collateral for the money they advanced or provided.

Defendant's counsel moves to strike out the answer, as containing the witness' conclusions and interpretation of the agreement, and not a statement of the facts.

Q. Was there any other security agreement between the members of the Association for undertaking these other enterprises besides the Sioux City & Northern Railroad?

Objected to as irrelevant and immaterial.

A. No, sir; not to my recollection.

Q. Let me ask you what the understanding was, or practice, or agreement in respect, if any, to this Railroad Syndicate's paper which might mature during the prosecution of these enterprises, and for which renewals might be given?

Objected to as irrelevant, immaterial and as leading, and that the practice or understanding of the parties as testified to by this witness are not competent evidence in this case against this defendant, and that the question calls for merely hearsay on the part of the witness.

"A. The practice was to—when a note became due—substitute another immediately to take the

place of the old note, and the security being behind the new note in place of the old.

Defendant's counsel moves to strike out the answer, for the reason stated in the question, and as not responsive to the question (p. 1698).

"Q. State whether or not this account was continuous from the time of its inception to—for how long was it a continuous and unbroken account?"

Objected to as irrelevant and immaterial and not the best evidence.

A. Well, from about the time of the formation of the syndicate until the 25th or 26th of April, 1893" (p. 1698).

JOHN HORNICK testified:

"Q. By what means or method was the money raised for the construction of the Sioux City and Northern?

Objected to as immaterial and irrelevant.

Q. What arrangement was made to that end?

Same objection.

A. There was an arrangement made whereby I was to issue notes or to sign notes, and turn them over to the Union Loan and Trust Co. to dispose of them, and the proceeds credited to my account and checked out for railroad purposes only—to buy material—construction material, and material for the road and to build the road. The signing of notes was at first limited to myself. Later other persons signed notes (pp. 890-91).

Q. What further arrangement, if any, was made for the security of the railroad syndicate paper negotiated through the Union Loan & Trust Co. in behalf of this railroad syndicate for railroad syndicate purposes?

Objected to as leading, immaterial, irrelevant, incompetent, as calling for transactions

between parties other than those connected with the present controversy, and as calling for a conclusion.

A. The arrangement was made that the collateral—the bonds and stock of the road, should be collateral for any notes *that I signed* and put out for that purpose, and they were to be placed in the Union Loan & Trust Co. when issued and there remain as collateral (p. 891).

Q. As collateral for *these railroad syndicate notes* negotiated through the Union Loan and Trust Co.?

Same objection and also because it is leading him to answer differently from what he did in his answer to the former question. It is a direct leading of him to contradict himself as to what he had previously testified.

A. Yes, sir (p. 891).

Q. State whether or not such collateral was placed with Union Loan & Trust Company *as such security?*

Objected to as immaterial, irrelevant and incompetent, as calling for a conclusion and not a statement of facts, and also as leading.

A. It was (p. 891).

Witness then stated that he had a talk or arrangement with E. R. Smith, secretary of the Union Loan & Trust Company, in connection with the collaterals there to protect the Railroad Syndicate indebtedness.

Q. You may state in substance what that was.

Objected to as irrelevant, immaterial, and calling for conversations with parties other than those to the present suit, and also before the witness can testify to any general conversation he must identify the time and place.

A. I had conversations with E. R. Smith several times in his office, the Union Loan & Trust Company's office, in reference to the collateral, and

whether it was there or not, *and he assured me in every instance that it was placed there in the vault.*

Q. What, if any, conversation or arrangement did you have with him as to its remaining there?

Same objection and also as leading. The proper method is to exhaust the witness' recollection as to what took place before his attention can be directed to any specific subject.

A. It was talked over in the presence of Mr. Garretson, vice-president of the Union Loan and Trust Company, and Mr. Smith, as secretary, and myself and Mr. Hedges were present, that all the collateral should remain there, and should not be removed, *only for sale*, and if they were sold the proceeds were to be returned to the Union Loan & Trust Company and credited to my account. I was very particular about that, because I was interested, having so much paper out (p. 892).

Q. At this time what securities of the Sioux City & Northern, if you know, were thus with the Union Loan & Trust Company as security, if any?

Objected to as irrelevant, immaterial and incompetent, and furthermore that no time has been designated by the witness when these conversations took place, and as leading, and as assuming facts which are not proven to exist.

A. At what time do you mean?

Q. The time you have been speaking of as to your arrangements with the vice-president and secretary of the Union Loan & Trust Co.?

A. *Well, that was along in the winter of* 1890, *and it was after the bonds and stock were issued;* before that they were not issued, but it was understood that the road was collateral until the stock was issued.

Defendant moves to strike out the words, "That it was understood that the road was

collateral" as incompetent, immaterial, irrelevant and hearsay.

Q. When the stock and bonds of the Sioux City & Northern were issued, where were all of them placed, if you know?

Objected to as immaterial, irrelevant and incompetent.

A. With the Union Loan & Trust Co.

Q. *For what purpose, if you know?*

Objected to as calling for a conclusion, irrelevant, and that the witness cannot testify unless he placed them there himself.

A. *For the purpose of securing the notes that I had signed for the syndicate* (pp. 892-3).

Q. Now, further along in the conduct of the enterprises of the Railroad Syndicate, you may state whether there were other Railroad Syndicate notes thus negotiated through the Union Loan & Trust Company than those signed by you, if you know?

Objected to as incompetent, immaterial and irrelevant.

A. There was (p. 893).

Q. You may state what, if any, understanding or arrangement was made in regard to the security of those syndicate notes other than those signed by you?

Objected to as leading, irrelevant, incompetent, immaterial, and assuming a fact which has not been proven, and as calling for conclusions rather than actual facts.

A. Well, the actual facts were to my knowledge that I gave notes to Mr. Haakinson, for instance, $100,000, say $25,000 each, four notes, and Mr. Haakinson in turn would sign twenty $5,000 notes, and my note was held by Mr. Haakinson to indemnify him, and his notes were sold and the proceeds entered up to my credit and disbursed in payment of railroad bills.

Q. *What, if any, security was there for those notes with the Union Loan & Trust Co. signed by Hankinson and the other members of the syndicate?*

Same objection, and as leading and as specifically avoiding any inquiry as to the fact, and calling for a conclusion to which the question seeks to lead the witness' mind.

A. The same security that was behind my notes—were left on deposit to secure my notes.

Q. You may state the facts as to whether or not all of the securities that the Railroad Syndicate placed with the Union Loan & Trust Co. were placed there *as collateral security for the continuing indebtedness of the Railroad Syndicate arising out of notes furnished by the Railroad Syndicate, and negotiated through the Union Loan & Trust Co. and the proceeds credited to the account of John Hornick, trustee.*

Objected to as leading, as calling for a conclusion, assuming facts not in evidence, and specifically avoiding inquiry as to the facts, and as irrelevant, immaterial and incompetent, and as setting the witness up as a judge to try this case.

A. They were; all of the securities were deposited there to secure any indebtedness that was made - any and all indebtedness that was made by the syndicate for railroad purposes (p. 894).

Q. Were there other railroad securities placed with the Union Loan & Trust Co.—were there railroad securities other than the bonds and stock of the Sioux City & Northern placed with the Union Loan & Trust Co. to secure this same railroad syndicate paper?

Same objection and as calling for a conclusion and assuming facts not proven in evidence, immaterial and irrelevant.

A. There was; the bonds and stock of the Sioux City, O'Neill & Western—I don't remember, now,

whether that was the name of the first organization or not, but Mr. Garretson loaned the road on the other side of the river something like a half a million dollars, and took collateral for it, and put it into the Union Loan & Trust Co ; the money that he loaned was the syndicate money.

Defendant's counsel moves to strike out the answers as being evidently statements based on hearsay evidence (p. 897).

Q. Do you recollect seeing the Nebraska & Western bonds down in the office of the Union Loan & Trust Co. *as security?*

Objected to as leading, incompetent, immaterial and irrelevant.

A. I have seen some of them; yes, sir (p. 897).

Witness did not remember how many bonds of the Nebraska & Western he saw. It was a large amount.

Q. You may state, if you know, under what arrangement these securities were there?

Objected to as immaterial, irrelevant and incompetent.

A. The money that Mr. Garretson loaned was syndicate money, and *they were placed there to secure the amount he took out* (p. 897).

Q. After the Sioux City & Northern R. R. enterprise, what other railroad enterprises did you go into, if any, in the railroad syndicate?

Objected to as incompetent, immaterial and irrelevant.

A. I went into the Nebraska & Western, now usually known as the Short Line. Its real name, I think, is now the Sioux City, O'Neill & Western.

Q. And under what arrangement did you go into that finally?

Same objection.

A. The same arrangement that we went into the first enterprise, Sioux City & Northern.

Q. Under what arrangement was money raised in connection with that enterprise?

Same objection.

A. In the same way that it was raised for the Sioux City & Northern (pp. 897-8).

Q. And what, if any, arrangement was there as to the securities of that road and the properties of the road?

Same objection, and as calling for a conclusion and not for facts.

A. The facts are that all of the securities of the Sioux City, O'Neill & Western was to be placed in the Union Loan & Trust Company for the same purpose as the Sioux City & Northern collaterals were placed there.

Defendant moves to strike out the answer as hearsay and a statement of conclusions and not facts (p. 898).

D. T. HEDGES also testified:

That Mr. Garretson told the syndicate that the Union Loan & Trust Company would endorse the paper of the syndicate, receive the railroad securities, when they were obtained, as collateral for the amount advanced or the amount provided, and he (Hedges) got his understanding, concerning which he testified on direct-examination (*supra*), *from that statement* (pp. 1710-11).

That this conversation was had *at the time the syndicate was formed*, when they embarked in the construction of the Sioux City & Northern Railroad, and that *when the syndicate agreement was signed*, Garretson stated to the syndicate that the Union Loan & Trust Company would endorse the notes and provide the money, and would receive the securities as they were obtained, and the securities were to be held by the Trust Company, *and when they were sold*, the funds were to be placed to the credit of Mr. Hornick as trustee, and he understood that the notes

given by the syndicate were to be paid out of the proceeds of the sale of the securities (p. 1711).

IT WILL BE OBSERVED THAT EVEN WITH THE WORDS PUT INTO THEIR MOUTHS, THE PETITIONERS' WITNESSES DO NOT AGREE IN THEIR STATEMENT OF WHAT THE ALLEGED AGREEMENT OF PLEDGE WAS.

GARRETSON'S version is that the bonds and stock of the Sioux City & Northern R. R. Co. were at one time or another put in the Union Loan & Trust Co. "*as collateral for money borrowed there by certain* "*members of the syndicate;*" and that a portion of the Nebraska & Western bonds were put there "*for* "*money borrowed to help the people that were build-*" *ing the Nebraska Road at the time they were con-*" *structing it*" (p. 696).

HORNICK said the arrangement was "that the bonds and stock of the road" (*i. e.*, the Sioux City & Northern) "should be collateral *for any notes that I signed and put out for that purpose*, and they were to be placed in the Union Loan and Trust Company, when issued, and there remain as collateral."

Q. As collateral for these Railroad Syndicate notes, negotiated through the Union Loan and Trust Co.?

A. Yes, sir (p. 891).

On cross examination, that he understood that the collaterals were to secure the notes which *he* made, and on which *he* was liable. That was a *verbal* agreement between the members of the syndicate (p. 904).

HAAKINSON agreed with Hornick's version until he was led to say that *his* notes were secured by the same collaterals as those of Hornick (p. 909).

HEDGES' version was that the syndicate agreed with Garretson that the securities to be received by them were to be placed with the Union Loan and Trust Co. as security to them or for them *until the securities were sold and the debts paid;* as collateral for all the money that they advanced or provided (p. 1711).

WHILE THERE IS EVIDENCE THAT AT TIMES SOME OF THE SECURITIES IN CONTROVERSY WERE PHYSICALLY IN THE OFFICE OF THE UNION LOAN AND TRUST COMPANY, THERE IS NO COMPETENT EVIDENCE THAT THEY WERE EVER DELIVERED TO THE COMPANY IN PLEDGE.

No evidence of delivery of any of the securities to Union Loan and Trust Company in pledge.

HORNICK, on DIRECT-EXAMINATION, and *led by the petitioner's counsel*, stated that all of the bonds and stock of the Sioux City and Northern when issued were placed with the Union Loan and Trust Company for the purpose of securing the notes that he signed for the syndicate (p. 893), and that Garretson loaned the Nebraska Road something like half a million dollars which was syndicate money, and took collateral for it, and put it into the Union Loan and Trust Company, and he recollected seeing a large amount of Nebraska and Western bonds there which were placed there to secure the loan (pp. 896-97); but on CROSS-EXAMINATION he stated that he was personally never in possession of the collateral, except one-fifth of the stock of the Sioux City and Northern, the certificate of which was handed to him in the office of the Union Loan and Trust Company, made out in his name, and he signed a transfer on the back and gave it to Mr. Smith; *and that this certificate was the only part of the collateral that he ever personally deposited with the Loan and Trust Company;* and that was some time in the spring of 1890 (p. 903).

HAAKINSON saw none of the securities with the Union Loan and Trust Company, except certificates of stock of the Sioux City and Northern, which were made out in his name. He was notified by Smith that there was $287,500 of this stock turned over to them "on my account, which they sent me a receipt for, I think; *I can't say for certain whether it was in the Union Loan and Trust Company's office or somewhere else*, but I saw the stock because I signed it on the back. I have no recollection as to the place I saw it" (p. 907). On cross-examination he stated that he was never personally in possession

of any of this collateral, excepting the certificate of stock to which he had referred.

HEDGES being asked whether he ever had in his possession any of the railroad property securities, stated that his recollection was that he had $360,000, or about that, of Sioux City and Northern stock, something over $300,000, in his possession long enough to endorse it and return it to the Union Loan and Trust Co. (p. 1709).

On cross-examination his recollection was that E. R. Smith brought him a certificate and he endorsed it and returned it to him. That no conversation that he recollected took place between him and Smith at the time; the certificate was in his name (p. 1710).

GARRETSON testified on direct examination: "We put with the Union Loan & Trust Company all of our railroad securities, as we came into possession of them, and we withdrew from the Union Loan & Trust Company various railway securities from time to time on which to raise money elsewhere. * * * All of the securities, both bonds and stock, of the Sioux City & Northern Railroad Company, were at one time or another put in the Union Loan and Trust Co. as collateral for money borrowed there by certain members of the syndicate, and a portion of the bonds of the Nebraska & Western Railway Co. were put in the Union Loan & Trust Company for money borrowed to help the people that were building the Nebraska Road at the time they were constructing it, and later on the stock of the Sioux City, O'Neill & Western Railway was in possession of the Union Loan & Trust Company" (pp. 696–7).

On cross-examination he was asked:

Q. And you cannot recollect of any specific transaction of pledge of those securities or any of them?

A. My memory is this, that the stock and bonds of the Sioux City and Northern Road went in there primarily, and that a portion of the bonds of the Nebraska & Western went in there *physically*, and

finally, the stock of the Sioux City, O'Neill & Western Company went in there *physically.*

Q. *And that is all you recollect about it?*

A. YES, SIR (p. 820).

Records of Union Loan and Trust Co. at variance with oral testimony.

NO ENTRY APPEARS UPON THE BOOKS OF THE UNION LOAN AND TRUST COMPANY SHOWING ANY INTEREST WHATEVER IN THE SECURITIES IN CONTROVERSY, OR ANY PLEDGE OF THEM, AS SECURITY FOR RAILROAD SYNDICATE PAPER, OR FOR THE TRUST COMPANY'S ENDORSEMENT THEREOF, OR FOR ANY OTHER PURPOSE.

NONE OF THE SHARES OF THE SIOUX CITY AND NORTHERN STOCK EVER STOOD IN THE NAME OF THE UNION LOAN AND TRUST CO., NOR DID ANY OF THE BONDS OF THE NEBRASKA AND WESTERN OR OF THE SIOUX CITY AND O'NEILL AND WESTERN RAILWAY COMPANY (p. 1607).

There was no entry on the books of the Union Loan & Trust Company with reference to the discounting of the Railroad Syndicate paper, beyond the entries of amounts debited and credited to accounts with members of the Railroad Syndicate in the books of account. The "John Hornick, trustee," account was supposed to contain all of that; except that there was also a separate account against the Terminal Company. There was no entries in the Register of collaterals kept by the Union Loan and Trust Company concerning Railroad Syndicate paper (p. 941).

The minute book of the company was offered in evidence by the petitioner, and while it contains minutes of proceedings at meeting of the Board of Directors from the incorporation of the company down to the day before its assignment, THERE ARE NO MINUTES REFERRING TO ANY OF THE ALLEGED TRANSACTIONS WITH THE RAILROAD SYNDICATE, AND NO REFERENCE TO ANY OF THE COLLATERAL IN CONTROVERSY (Petrs.' Ex. 90, pp. 1071–1102).

Mr. HUBBARD, the petitioner, testified in his own behalf as follows:

By Mr. Coombs: "Q. I will ask you if among any of the records of the corporation or any memorandum, or among any of its papers, you found any authority for the withdrawal of any of the securities that were collateral to the Railroad Syndicate paper from the Union Loan and Trust Co.?

A. I did not find any record of such authority. I *did not find anything touching the question.* I examined the records of that company that came into my possession for that purpose" (p. 929).

On cross examination he testified *that there was no entry in the books of the Union Loan & Trust Co.*, showing that even the *stock* of the Sioux City, O'Neill and Western Railroad Co. was held by that company *as collateral to the Syndicate paper.* His information about it was derived in part from outside sources, and in part from the envelope in which the stock was contained, and a memorandum accompanying it. Afterwards the stock was taken and placed in another paper, and the envelope was not now in his possession. To the best of his recollection there was an endorsement on it, something to the effect that it was collateral for railroad paper. He did not remember the language of it at all; *that there was nothing in the books of the Union Loan & Trust Company to show what, if any other collateral, was held by the Union Loan & Trust Company for Railroad Syndicate paper,* OR IF ANY COLLATERAL WAS AT ANY TIME HELD BY THE UNION LOAN & TRUST COMPANY FOR THE RAILROAD SYNDICATE PAPER (p. 933).

Management of Union Loan and Trust Co. left to E. R. Smith.

The Union Loan and Trust Company was left to the almost exclusive management of E. R. Smith, its secretary and treasurer. The president, George L. Joy, took but little part in the management of the trust company's affairs (p. 762, 827). He attended no meeting of the directors after December

31, 1890 (pp. 1079–1102). Every letter from the Union Loan and Trust Company in evidence in the case is signed "E. R. Smith, Secy. and Treas." His name was also signed to the above mentioned circulars with which he flooded the country at the rate, as he testified, of about 10,000 a month (p. 824), containing the false statements that "*in every case*"—where the company handled paper—"*we hold good and sufficient security from the maker.*" Smith was the sole officer who assumed to represent the trust company, and who, during a period or more than three years, did represent it in all of its business matters; and who signed in the name of the company the endorsements upon all the notes which were outstanding at the time of its failure (p. 846). IN NONE OF THE TRANSACTIONS WITH THE DEFENDANTS REFERRED TO IN THE EVIDENCE IN THIS CAUSE DID GARRETSON EVER ASSUME TO REPRESENT OR ACT FOR THE UNION LOAN AND TRUST COMPANY.

The directors of the company seldom held meetings, and when they did, the proceedings were only of the most formal character (pp. 1071–1102). There were but three meetings in each of the years 1890 and 1891, and but two in 1892 and 1893, respectively. The minute book (Petrs.' Ex. 90, pp. 1071-1102) contains but meagre records of formal action. Although its charter provided that "*this company shall not purchase nor loan its funds "on the securities of any railroad company*" (Petrs.' Ex. 90, p. 1072), and the by-laws forbad the making of any investment of the company's funds "not contemplated by the articles of incorporation" (p. 1075), between five and six million dollars of paper endorsed by the Union Loan and Trust Company was outstanding at the time of its failure, of which about $3,000,000 was what was known as "Railroad Syndicate" paper. *No authority whatever was found in the minute books for the endorsement or issue of any of this paper* (p. 935). The history of its

issuance involves a consideration of the evidence relating to

THE OPERATIONS OF THE RAILROAD SYNDICATE.

Syndicate Agreement.

The "Syndicate Agreement" (p. 941), above referred to, dated July 3, 1889, recited that the five parties above named had associated themselves together to build and equip the Sioux City and Northern Railroad, and had agreed "That all money borrowed and contracts made for the building of the road and for equipment shall be borne equally by the parties hereto." * * * And, in addition to the other provisions above quoted, "that this contract shall hold good until said road is built and all debts in connection therewith are paid, and this memoranda of agreement shall be left with the Union Loan and Trust Company until all of the conditions contained herein are fulfilled and until its surrender is agreed upon by all the parties hereto. 4th. All losses to be borne equally by the parties hereto, and all profits to be divided equally between the parties to the contract" (p. 941-2).

No provision as to how the notes of any one of the parties were to be secured was contained in the agreement.

Syndicate's Operations.

The Sioux City and Northern Railroad was constructed by this syndicate, some of the money therefor being raised upon notes of members of the syndicate, which were discounted by the Union Loan and Trust Company, and the proceeds credited to the account of John Hornick, trustee, and drawn against as provided in the syndicate agreement (pp. 694-823-4).

The syndicate used the vaults of the Union Loan & Trust Company for storage purposes freely, and no suggestion was made to any person dealing with them that there was any other relation with that company. Garretson was, as HEDGES testified, the financier of the syndicate; the financial management was left to him by the other members of the

syndicate (p. 1709), and he received for the syndicate such securities as they acquired.

The railroad was completed in January, 1890, and the syndicate acquired by its construction $1,940,000 of first mortgage bonds, secured by mortgage to the Manhattan Trust Company of New York, as trustee, dated January 1, 1890, and 14,391 shares of its capital stock.

On February 24, 1890, E. R. Smith, secretary of the Union Loan & Trust Company, of Sioux City, wrote to F. O. French, president Manhattan Trust Company as follows:

"We forward to-day to your company, by American Express, bonds of the Sioux City & Northern Railroad Company, numbered 1 to 1920, inclusive, $1,000 each, only lacking trust certificate of your company to make them complete. Kindly acknowledge receipt to us and oblige" (Deft.'s Ex. 102, p. 1503).

And on the same date, A. S. Garretson wrote to J. I. Waterbury, vice-president Manhattan Trust Company, as follows:

"The bonds of the Sioux City & Northern Railroad Company, 1920 in number, have been executed by the officers of the company. The trust deed has been filed in each county of Iowa, Minnesota and Dakota, through which the road runs. Trust deed and bonds go forward to you to-day by express (charges paid). Please certify to bonds *and hold same subject to my order.* * * * Please acknowledge the receipt of bonds to me, and receipt of trust deed by the Sioux City and Northern Ex." (Deft.'s Ex. 103, pp. 1504-5).

Receipt of these bonds was acknowledged by the Manhattan Trust Company to the Union Loan & Trust Company on February 28, 1890 (Int. Ex. 15, p. 658), and the bonds which were in form payable

to bearer, were countersigned by the Trust Company as trustee, March 15, 1890.

On March 12, 1890, E. R. Smith, secretary Union Loan and Trust Co., wrote F. O. French, president Manhattan Trust Co., as follows:

"Some days since we shipped you by express 1,920 bonds, $1,000 each, of the Sioux City and Northern R. R. Co., the receipt of which was duly acknowledged by your secretary. WE WOULD LIKE TO HAVE YOUR COMPANY ISSUE A RECEIPT FOR THESE BONDS TO A. S. GARRETSON AND FORWARD TO HIM, AND ADVISE US WHEN DONE" (Deft.'s Ex. 101, p. 1503).

On March 15th the Manhattan Trust Co. wrote acknowledging the receipt of the latter request, sending receipt to Garretson and asking return of former receipt (Deft.'s Ex. 115, p. 1512. Int. Ex. No. 16, p. 658).

Shortly after this, Garretson employed Mr. Waterbury, the vice-president of the Manhattan Trust Co., to sell the bonds for him, and gave him an option until July 4th, and at his request and with his concurrence Waterbury offered the bonds for sale in London through Mr. Henry W. Cannon, former Comptroller of the Currency of the United States and a director in the Manhattan Trust Co., who sailed to Europe some time in May. The price at which he had the option was 90, less 5 per cent, or 85 per cent. net. Waterbury did not sell them, although he made strenuous efforts and incurred some expense (pp. 1412-13). The price asked by Garretson was too high. Waterbury offered them to J. Kennedy Tod & Co., who declined to buy at the price asked (Ex. 160, p. 1557).

Waterbury testified that in August, Garretson advised him that he had an opportunity and could effect a sale of the bonds in Boston, and directed the Trust Company to ship the same to Boston to be delivered to T. V. Parker & Co., or on their order.

A telegram dated August 27, 1890, from Garretson to Waterbury, was produced, reading: "As per request of a banker in Boston I am writing you to day to express the bonds to Boston. Please see Kennedy and call on them to decide." "Kennedy" meant Tod & Co. (p. 1414, Defts.' Ex. 159, p. 1556), to whom Waterbury was trying to sell the bonds.

The bonds were shipped to Boston in accordance with such instructions, with directions to hold the same subject to the order of the Sioux City and Northern Railroad Co., which being reported to Garretson on September 12, 1890, he telegraphed: "The Railroad Company does not own the bonds sent to the Boston Safe Deposit. Order them hold the bonds subject to order of T. V. Parker & Co., Boston" (Ex. 163, p. 1557; p. 1415); this was done and there they remained until the pledge of a part of them to Manhattan Trust Co. and the sale to Messrs. Tod & Co. hereinafter referred to.

The stock was issued in certificates in the names of the five members of the syndicate respectively (p. 1710).

Smith testified, under objection, that in January, 1890, there was approximately $2,000,000 of syndicate paper outstanding (p. 845). It is not clearly shown, but possibly the inference is justified, that this paper had been discounted for the syndicate and sold by the Union Loan and Trust Co.

About the date of the completion of the Sioux City and Northern Railroad there was another enterprise started to build a railroad, described as the Pacific Short Line, from a point on the Missouri River opposite to Sioux City, westward to Ogden, Utah.

This railroad was to be formed by the consolidation of three corporations organized in Nebraska, Wyoming and Utah respectively; the former being known as the Nebraska and Western R. R. Co. A construction company known as "The Wyoming Pacific Improvement Company" had been incorporated in Wyoming, and had entered into a con-

tract to build the said railroad in consideration of $20,000 in first mortgage bonds, and an equal amount in stock per mile of completed railroad (Ex. A, p. 1564). The Improvement Company at first raised money to prosecute the work on "Certificates of subscription" in the form of Ex. 81, p. 1038. Garretson, Hornick and Booge in April, 1888, had become subscribers to the enterprise to the extent of $100,000 (pp. 1038-9-943).

In February, 1890, the scheme of raising funds under such subscription had proved a failure, no road had been completed, no bonds earned, and some other method had to be adopted to raise money to carry on the enterprise (pp. 817-818). A negotiation was then had, resulting in an agreement by which certain parties in New York agreed to advance one million dollars to the Improvement Company to be expended specifically in building and completing sections of the line of the Nebraska and Western Railway, between a point opposite Sioux City, and O'Neill, Nebraska, upon the security of its first mortgage bonds, as the same were earned under the contract with the Improvement Company by such construction, which bonds were to be deposited in pledge with the Manhattan Trust Company, as trustee for the lenders, under a loan agreement dated February 1, 1890, at the rate of two dollars in bonds for each one dollar of advance (Deft.'s Ex. 1, p. 1462; Deft.'s Exs. 3 and 4, pp. 1468-9).

GARRETSON, BOOGE, HEDGES, HORNICK and HAAKINSON, thereupon executed a further agreement, bearing date February 15, 1890, which recited that the parties had previously contracted together to build the Sioux City and Northern Railroad and that it would be to their advantage "to use "their influence and do such things as may be "necessary to be done in order to secure the im- "mediate construction of the Pacific Short Line "from Sioux City westward to O'Neill," and agreed that the parties should for such purpose raise at once $350,000 "in whatever manner as may be

agreed upon orally between the parties hereto," of which sum $250,000 should be loaned to the Wyoming Pacific Improvement Co., " based upon " a deposit of first mortgage bonds of the Nebraska " and Western Railway Co. to the amount of $500,- " 000, which are held by the Manhattan Trust Co., " of New York City, in trust for said loan of $250,- " 000," and (2) " to advance the sum of $100,000 as " subscribed to the trust certificates of the Wyoming " Pacific Improvement Co., being entire amount " of subscriptions made by parties to this contract, " and all of said certificates, aggregating the sum " of $100,000, are to be assigned by the parties " having paid in thereon," *i.e.*, Garretson, Hedges & Booge, " to this Syndicate, which certificates, and " the avails of the loan to Wyoming Pacific Co., " ARE TO BE RECEIVED THE SAME AS THE STOCKS AND " BONDS OF THE SIOUX CITY AND NORTHERN CO. AND " HELD IN A POOL FOR THE BENEFIT OF THE PARTIES " HERETO " (pp. 1037–8).

Garretson and Hedges thereupon subscribed $125,- 000 each towards the $1,000,000 loan agreement, the balance being subscribed in New York, August Belmont & Co. subscribing $500,000 thereof (pp. 1468, 560, 446-7). As a condition to the loan agreement, the bonds were also underwritten by a number of parties who agreed that if the above mentioned loan was not paid when due, they would take the number of bonds set opposite their respective names at 50 cents on the dollar. Garretson and Hedges each became underwriters to this agreement to the extent of $250,000 in bonds each (Deft.'s Ex. 4-5, pp. 1469-70). The million dollar loan was over subscribed and $1,050,000 was advanced under it, $2,100,000 of bonds being earned and deposited in pledge with the Manhattan Trust Company as security for the same (pp. 446-9). This amount proving insufficient to complete the railroad to O'Neill, further loans were negotiated and made through the Manhattan Trust Company, to the amount of $470,000 in addition, and $2,583,000 of bonds in all were earned; the additional

loan of $470,000 being secured by 483 Nebraska & Western bonds, 26,000 shares of Nebraska & Western stock, and $50,000 of the bonds of the Town of O'Neill, which had been issued in aid of the construction of the railroad (pp 1417–19; Ex. 20 to 25, pp. 1476-85). Garretson also arranged a further advance of $75,000 on the 500 bonds deposited in pledge to secure $250,000 advanced under the million dollar agreement, so that he stood advanced for the syndicate to the enterprise in the amount of $325,000 upon 500 Nebraska & Western bonds (Ex. 170, p. 1561; Ex. 171, p. 1425; Deft.'s Ex. 5, p. 1748).

Garretson's Purchase of notes secured by N. & W. bonds.

In November, 1890, the notes held by August Belmont & Co. fell due, and they having declined to renew them, Garretson, who had for some time been negotiating to acquire the Nebraska and Western Railroad, purchased the notes, borrowing the money for the purpose from the Manhattan Trust Company on his notes secured by a pledge of $750,000 of the Sioux City and Northern bonds (pp. 1420-3; 1192-1197; Ex. 166, p. 1559; Ex. 8, p. 950; Ex. 168, p 1560; Inter.'s Ex. 2, p. 670).

When Garretson returned to Sioux City and reported to his associates what he had done, they objected, and evidently there was a good deal of inharmonious discussion among them over the matter. In their testimony in this case they say that Garretson had no right to thus deal with the bonds, and petitioner's counsel claims that his pledge of them was in fraud of the Union Loan and Trust Company, and a wrongful diversion from the pledge of it—a pledge, it will be observed, which however much it should have been made, yet never *was* made, and which company had suffered Garretson to retain the bonds in his possession and deal with them as his own for eight months.

HEDGES testified that the members of the syndicate objected that Garretson had pledged the bonds without authority of the *syndicate* (nothing about the Union Loan and Trust Co.):

"Q. State what was said?

A. They made a fuss about it and Mr. Garretson said: 'By gum, boys, if you will stay by me we will pull you through!' So we consented.

Q. You ratified what he had done?

A. Yes, sir.

Q. After considering all the pros and cons you ratified what he did?

A. Yes, sir" (p. 1714).

HORNICK testified that they protested against what Garretson had done and told him that it was not right that he should remove the securities, that it was violating their contract and agreement (p. 896).

On cross-examination he admitted he gave no notice of any objection to the persons with whom the bonds had been hypothecated (pp. 903–4).

Shortly after this purchase a controversy also arose between Garretson and the officers of the Manhattan Trust Co. The latter testify that it was because they found that Garretson had not sold the Sioux City & Northern bonds, and they had made their loan to him on faith of his having so done. Garretson testified in this cause that they had deceived him as to the amount of the indebtedness of the Improvement Company; they deny that, and say that he knew as much about the affairs of the company as they did. This, however, has nothing to do with the rights of these appellees in this cause, although in view of the appellants' claim the evidence on the subject will be analyzed later on.

Agreement, Manhattan Trust Co. and Garretson, Jan. 28, 1891.

The syndicate having finally concluded to go on with the Nebraska and Western purchase, On January 28, 1891, an agreement was entered into between A. S. Garretson and the Manhattan Trust Co. "*for itself, and as trustee for or repre-*" *senting the several other parties holding notes of the*" *Wyoming Pacific Improvement Co., with bond as*" *collateral thereto*" (Deft.'s Ex. 2, p. 1106), whereby Garretson agreed to purchase certain notes and

claims against the Improvement Co., shown on a schedule annexed to the agreement marked A, and which after reciting that as by such purchase he would become the holder as collateral of large amounts of Nebraska & Western bonds, it was agreed that he should be assisted by all proper means in procuring a sale of the railroad under the existing foreclosure proceedings should he so desire, and a vacation of the receivership, so as to place him in control of the railway and carry out his views of reorganization, subject to all rights of redemption which might lawfully exist.

This contract was carried out by Garretson, and all the above notes were taken up by him.

To assist him in so doing various other loans were made to him:

On January 29, 1891, the Manhattan Trust Company loaned him $300,726.72 upon his promissory note of that date, payable on or before February 15, 1891, with 1,215 Nebraska & Western bonds, and 2,583 shares of Nebraska & Western stock as collateral (Ex. 3, p. 671), with which amount he took up the notes held by the Trust Company, aggregating $296,331.14 *supra*.

On January 29, 1891, it loaned him $25,989.58 on $93,000 of Nebraska & Western bonds. On February 14, 1891, $190,000 represented by two notes, one for $100,000, the other for $90,000, both secured by the same collateral, viz.: 170 Sioux City & Northern bonds and the equity in $750,000 Sioux City and Northern bonds held as collateral to Garretson's note for $500,000, maturing March 1, 1891 (pp. 672–4).

On February 13, 1891, $51,166.67 and $152,041.67, which were paid February 17, 1891 (p. 1432).

These loans were made in pursuance of the contract above mentioned to assist Garretson in getting control of all the bonds and stock of the Nebraska and Western Railroad.

Messrs. J. Kennedy Tod & Co. were in no way concerned with these transactions, and had no knowledge of them (pp. 1286, 1320, 1362, 1408).

In the latter part of December, 1890, or early January, 1891, Garretson and Hedges sought the aid of Mr. J. J. Hill in finding them a purchaser for the Sioux City and Northern bonds. Mr. Hill introduced them to Mr. Northcote, who took them to the office of J. Kennedy Tod & Co. to whom they offered the bonds. The negotiations were inconclusive. Garretson and Hedges wanted 90 per cent. for the bonds, Tod offered 66⅔ per cent., and the parties separated. About a month later, Hedges and Garretson again went to St. Paul and sought Mr. Hill's assistance, and through his intervention Messrs. J. Kennedy Tod & Co. did purchase the bonds at 75 (Hedges, pp. 1701-4; Garretson, pp. 722-3).

Sale to Tod & Co. of Sioux City & Northern bonds.

The deliveries of the bonds and payments therefor were made as follows:

On January 16, 1891, the Hanover National Bank delivered to Tod & Co. $500,000 of Sioux City & Northern Ry. Co. first mortgage 5% bonds, for which they paid that bank $376,041.66, being at the rate of 75 per cent. and accrued interest from the 1st of January, 1891.

On February 3, 1891, the Hanover National Bank delivered a second lot of $500,000 of said bonds, for which they paid that bank $377,222.22, being at the same rate.

On February 17, 1891, Tod & Co. received from A. S. Garretson and the clerks of the Manhattan Trust Co. $920,000 of said bonds, and on the same day they cashed Garretson's drafts on them for $190,213.75 (being the amount, with interest, of Garretson's note to Manhattan Trust Co. dated February 14th, *supra*, secured by pledge of $170,000 Sioux City and Northern bonds and the equity in the $750,000 of said bonds pledged for his note for $500,000 due March 1st; Int. Ex. 4, 5, pp. 672-4), and $504,166.67 (being the amount, with interest, of the said $500,000

note secured by pledge of $750,000 of said bonds, with interest), thus releasing such $920,000 of bonds (p. 550, Petr.'s Exhibit 9A to 9J; Deft.s' Ex. 150B, p. 1550).

Application of Proceeds Sale S. C. & N. Bonds.

It was shown in evidence in this cause that the entire proceeds of the sale of the said bonds, except so much as was applied in payment of the notes held by Manhattan Trust Company secured by the pledge of $920,000 of said bonds were paid to the Union Loan and Trust Company and credited to the Railroad Syndicate account (pp. 842-3).

The notes for $500,000 thus paid were those given by Garretson November 1, 1890, with the proceeds of which he acquired what is called by Garretson and the appellant's counsel the "Belmont" notes for $500,000, with $1,000,000 Nebraska Western bonds as collateral; and the proceeds of the notes for $190,000 so paid were used in taking up Garretson's notes given to raise funds with which to take up Wyoming Pacific Improvement Company notes with Nebraska & Western bonds as collateral, under his agreement of January 28, 1891, with the Trust Company, *supra*.

Messrs. Tod & Co. afterwards disposed of the Sioux City and Northern bonds so purchased; the Great Northern R. R. Co. did not buy any of them.

Although the Union Loan & Trust Company only received the proceeds of the sale of $1,000,000 of the Sioux City & Northern bonds, the balance being applied to take up the notes which Garretson had given to raise funds to acquire the Nebraska and Western bonds, the officers of the Trust Company took no action from which it could be inferred that they regarded Garretson's action as unauthorized or fraudulent. There is an utter want of evidence, either by letter or spoken word, of the company having made any objection whatever to what was done, while Garretson's associates, composing the syndicate, expressly ratified his action. The Manhattan Trust Company made certain additional loans to Garret-

son in carrying out the agreement of January 28, *supra*, viz.:

On June 13, 1891, $23,000, secured by 93,000 Nebraska & Western bonds.

On July 31st, $50,000 secured by 2,000 shares Sioux City & Northern stock, the certificates for which were in Garretson's name, with transfers in blank endorsed thereon signed by him (p. 1432).

On July 31st, $17,000 (afterwards increased to $22,000) secured by $43,000 Nebraska and Western bonds (p. 1433).

During May and June, 1891—the Wyoming-Pacific Improvement Company having failed and a receiver having been appointed of its affairs—pursuant to the provisions in the agreement between Garretson and the Manhattan Trust Company, whereby the Trust Company agreed to use its best efforts to perfect the title in Garretson to the bonds held in pledge as security for the Wyoming-Pacific Improvement Company loans, these loans were foreclosed and the bonds bought in for Garretson at auction sales in the City of New York, he becoming the owner thereof.

(See Ex. 28b. 27, 28; pp. 1486-7; Defendants' Ex. 29, 30; pp. 1488-9; Defendants' Ex. 31a, 31; pp. 1490-91; Defendants' Ex. 32, p. 1492; Defendants' Ex. 33, p. 1493; also testimony of J. I. Waterbury, pp. 1429-31, and of A. J. McCormack, pp. 1241-3.)

The proceedings which were pending for the foreclosure of the Nebraska and Western mortgage eventuated in a decree of foreclosure and sale on the 30th day of June, 1891, the date of sale being fixed as September 1, 1891 (pp. 1656-60), afterwards postponed to October 23d (p. 1661). Garretson thereupon undertook negotiations with Messrs. Tod & Co. for a loan of enough money to enable him to acquire complete ownership of the Nebraska and Western Railroad. On July 31, 1891, Tod & Co. had loaned Garretson $76,000 on his note, secured by $200,000 Nebraska and Western bonds. *This was the first time they had had*

anything to do with those bonds. Negotiations for further loans resulted finally in an agreement dated October 1, 1891, whereby Messrs. J. Kennedy Tod & Company undertook and agreed to find a market for Garretson's demand notes in the sum of $5,000 each, to the aggregate amount of $1,000,000, all of which were to be equally secured by the pledge to Tod & Company of the entire issue of Nebraska & Western bonds and 7,200 shares of Sioux City and Northern stock.

The Million Dollar Loan to Garretson.

The Million Dollar Loan, Tod & Co. to Garretson.

This agreement, which is referred to in the testimony and in appellant's brief as "the million dollar loan agreement" (Petr's. Ex. 3, p. 646), recited that Garretson was the holder of bonds of the Nebraska & Western Railway Co. to the amount of $2,500,000, or thereabouts, secured by mortgage to the Manhattan Trust Company, and also of 25,000 shares, or thereabouts, of the Stock of said Railroad Company, being practically all of its stock, and 7,200 shares of the Stock of the Sioux City & Northern R. R. Co.; that proceedings were pending for the foreclosure and sale of the said Nebraska & Western Railway, that sale was shortly to be had, and that Garretson proposed to purchase said road on his own behalf and that of his associates, to form a new corporation and obtain its capital stock and an issue of bonds at the rate of $18,000 per mile, in payment of said road so to be purchased, when conveyed and transferred to the new corporation; that he desired to borrow money to carry out said enterprise, and for other purposes; and it was therefore *agreed* that Garretson should make and deliver to Tod & Company his 200 negotiable promissory notes of $5,000 each, all dated October 1st, 1891, *payable on demand*, with interest at 6 per cent., drawn to his own order and endorsed in blank, in the form annexed to the Agreement, and should deposit with Tod & Co. as security for the payment

Agreement, October 1, 1891.

thereof, the said bonds and stock of the Nebraska and Western Railway Co. and the said 7,200 shares of stock of the Sioux City & Northern R. R. Co. That Tod & Co. should procure the said notes to be sold at par, and accrued interest, within two months from date, and that they should advance thereon at once, to Garretson, not exceeding $200,000, provided the same should be required in obtaining title to the Nebraska and Western Railway.

It was further agreed that upon the purchase of the Nebraska and Western road a new corporation should be organized to take over the same; and a new mortgage of such railway executed thereon to the Manhattan Trust Company to secure an issue of bonds at the rate of $18,000 per mile of completed road, and that thereupon the entire amount of said bonds and one-half the capital stock of the said new corporation, should be delivered to Tod & Co. as security, in place and stead of the bonds and stock of the Nebraska and Western pledged under the agreement. That in case Garretson should require a deposit in court of the bonds on the existing road, the road should be purchased *by trustees*, or Garretson's bid assigned as security, until the new securities should be issued. That until such new corporation was formed and the new bonds and stock delivered, no amount in excess of $600,000 arising from the sale of the notes should be paid over to Garretson, but that the balance should be placed to his credit with Tod & Company at interest. That the bonds to be issued by the new corporation to be formed to take the Nebraska and Western Railway, should be further secured by all the stock of the Pacific Short Line Bridge except such part, not to exceed fifty shares, as should be required to qualify directors.

It was further agreed *that the holders of said notes* should be entitled to an option, to be availed of on or before November 1, 1892, to purchase the whole or any part of the said new bonds at seventy-five per cent. and accrued interest; a further

option to take all or any portion of the new stock at the actual cash cost thereof, without interest, to Garretson and his associates, and a further option to take all or any part of the stock of the Sioux City & Northern R. R. Co. pledged under the agreement at the actual cash cost thereof, without interest, to Garretson and his associates, and that each and every holder of a note who should not avail himself of any such option should be entitled, as compensation for the loss thereof, to a commission of six per cent. on the principal of the notes so held, to be paid on November 1, 1892, and before his *pro rata* share of the collaterals should be released by the bankers or the holders thereof. That Tod & Company should deduct from the first amounts received by Garretson, *one per cent.* on the principal of the notes, so to be sold, *as a commission for their services under the agreement.*

The notes were issued under said agreement, in the form therein prescribed, in sums of $5,000 each, aggregating in all $1,000,000, all payable on demand.

Negotiations for this agreement were had between Garretson and Tod & Co. in New York, and the agreement was put in final shape after Garretson had returned to Sioux City. On October 17, 1891, Tod & Co. wrote to Garretson: "Mr. Wickersham goes West to-day, and he carries with him the agreement which Mr. Cadwalader has drafted. He will explain it all to you and it will therefore be unnecessary for us to enter upon it. You will please consider that the interest upon the notes will be payable on the 31st of December and 30th of June, *irrespective of the time which they may be allowed to run*" (Petitioner's Exhibit 19, p. 991).

On October 19th they telegraphed him, "*Loan all arranged in terms agreement which Wickersham has*, but which contains some errors, which will be corrected by telegram to-morrow" (p. 1125).

On October 20th they wrote confirming such

telegram, correcting the errors (which were merely typographical), and adding: "We regard it as essential to the success of the whole scheme that you should be provided with one million dollars, and we are unwilling to risk asking our friends to join in the loan of only eight hundred thousand dollars, which, we fear, might be found inadequate. We have therefore subscribed the remaining two hundred thousand dollars, or at least undertaken to provide it in terms of the contract" (Petr.'s Ex. 20, 992).

Delivery of securities to Tod & Co.

The sale of the road was to take place on October 23, 1891. By the loan agreement Garretson agreed "to deposit" with J. Kennedy Tod & Co., "for the common and equal benefit of those who should become holders" of his $5,000 demand notes, aggregating $1,000,000, "twenty-five hundred bonds or thereabouts of the Nebraska and Western Railway Company for $1,000 each," with the capital stock of said railroad, and 7,200 shares of the Sioux City and Northern stock (p. 647); with the further agreement that if the bonds so in the bankers' hands were required to be deposited in court, that should be done, but in such event the road should be purchased by trustees, or Garretson's bid assigned until the new securities were issued (p. 648).

$1,150,000 of said bonds were in New York, held as collateral to various notes made by Garretson, which Tod & Co. took up with a part of the proceeds of the $1,000,000 demand notes (pp. 951-6, 962-74); and on thus securing possession of the bonds they forwarded them to Mr. Wickersham, at Omaha. There was no time for Garretson to send the balance of the issue to New York and then have them returned to Omaha, consequently it was arranged that Garretson should deliver them to Mr. Wickersham, at Omaha, for account of Tod & Co.

On October 22d Tod & Co. telegraphed to Garretson, at Omaha: "Wickersham advises execution all "papers. They have not arrived yet, BUT IF YOU DE- "LIVER STOCK AND BALANCE OF BONDS TO HIM WE WILL

"PLACE CASH AT HIS DISPOSAL" (p. 1125). This referred to the cash required by the decree of foreclosure to be provided by the purchaser (p. 1659).

On October 19th Tod & Co. wrote to Mr. Wickersham, at Omaha, confirming the information that one million dollars of Nebraska and Western First Mortgage Bonds had been forwarded to him by Adams Express, and adding: "We confirm the arrangement entered into with you, UNDER WHICH "YOU WERE TO TELEGRAPH US WHEN YOU GAINED "POSSESSION OF THE BALANCE OF NEBRASKA AND "WESTERN BONDS, AND OF THE CAPITAL STOCK OF "THAT COMPANY, and that you were also to advise us of the credit which you desired to open, "through Messrs. Kountze Bros. of this city" (Deft.'s Ex. 148, p. 1548).

WILLIAM STEWART TOD, examined on behalf of defendant, testified that he personally had charge, on behalf of his firm, of the details concerning the said loan, and the deliveries of the Nebraska and Western bonds, and the Sioux City and Northern stock under that loan. That on October 19, 1891, he received from the Manhattan Trust Company $800,000 of said bonds, and on the same day from their own (Tod & Co.'s) cashier, $200,000 of said bonds, which had been pledged under a loan of $75,000 or $76,000 made by them to Garretson, making $1,000,000 in all (p. 1353).

That on the same day they sent these bonds to Mr. Wickersham, their counsel, at Omaha, to be used in buying the Nebraska and Western Railroad Company's property, pursuant to a previous arrangement that Mr. Wickersham should represent Tod & Co. in making the purchase of the Nebraska and Western property, as one of the trustees. That it was not considered possible to deliver all the bonds to Tod & Co. in New York under the pledge before the sale, and so they arranged that Wickersham should act for them, practically as their agent, *and the delivery made to him in Omaha should have the same effect as delivery to Tod & Co. in pledge.* That when they

received some of the bonds in New York and he in their behalf received the rest in Omaha, the effect, so far as they were concerned, was that all the bonds were pledged to them under the $1,000,000 loan (p. 1388).

On October 22d Wickersham wrote Tod acknowledging receipt from them of three packages of Nebraska and Western bonds aggregating $1,000,000, adding: "Mr. Garretson promises to bring the re- "maining bonds and the certificates of stock to "Omaha this evening" (pp. 1528-9).

On October 22d he wired Tod from Omaha: "Box "containing fourteen hundred twenty-three bonds "and all stock forwarded by Borrower from Sioux "City to-day. *He has given me order on express "company for them;* will get them in morning" (Ex. 121, p. 1527).

On October 23, 1891, they received a telegram from Mr. Wickersham that "Borrower" (*i. e.*, Garretson) "has delivered to me box said to contain "about fourteed hundred bonds and all stock" (Ex. 133, p. 1527).

On October 23, 1891, Garretson telegraphed Tod & Co.: "Contract and notes executed and sent to you "Wednesday morning. One hundred and fifty of "its bonds yet in New York held by St. Charles "Car Co. I have arranged with them to-day to "surrender them to you Monday next. BALANCE "OF THE BONDS HERE SUBJECT TO THE "ORDER OF MR. WICKERSHAM. Please ad- "vise E. L. Bierbower, cashier, that my checks on "you are good up to certain amount; avails of "notes to be placed to my credit, not to Wicker- "sham" (994).

On October 27th W. S. Tod received $150,000 in addition in Nebraska and Western bonds from the Merchants' National Bank, which on the same day he sent to Mr. Wickersham at Omaha (p. 1354).

On October 22d Wickersham telegraphed to Tod that Garretson preferred to purchase in the names of

himself and Wickersham, as trustees jointly (p. 1527).

On October 23d Garretson telegraphed Tod:

" Road bid in by Wickersham and myself. Every-
" thing satisfactory. Draft will amount to about
" one hundred thousand in aggregate. Wickersham
" will not draw for any funds " (p. 994).

On the same day, Wickersham telegraphed them:

" Property sold to Garretson and myself as trustees
" for two million dollars " (p. 1528).

On October 28th the sale was confirmed by the Court.

And on November 4th Mr. Wickersham wrote to Tod & Co. a full report of the proceedings in Omaha (Deft.'s Ex. 127, p. 1529), stating that a day or two after the receipt of the million dollars of bonds from them, " Mr. Garretson delivered to me $1,433,000 in
" the same bonds, and a certificate, numbered 51, for
" 25,831 shares of the Nebraska & Western Railway
" Company. The railroad was sold at auction pur-
" suant to the decree of the United States Circuit
" Court, District of Nebraska, on Friday, October
" 23d, and was purchased by Mr. Garretson and
" myself as trustees for the holders of the first mort-
" gage bonds of the Nebraska & Western Railroad
" Company for two million dollars. I delivered to
" Mr. Garretson $147,000 of the bonds deposited
" with you, to be used as a deposit in Court under
" the conditions of sale, which action you confirmed
" by telegram a day later. It was ascertained on
" the day of sale that $150,000 of the N. & W. bonds
" which had been delivered to the St. Charles Car
" Company by Mr. Garretson, as collateral, were in
" New York; and it was not until Tuesday that
" these bonds were delivered to you, and I did not
" receive them in Omaha until Friday the 30th
" ultimo. In the meantime on Wednesday 28th
" the Court confirmed the sale and directed a deed
" to issue in compliance with the decree. On Friday
" the 30th instant, the remaining 150 bonds arrived,
" and I deposited the entire issue $2,583,000 (includ-

"ing the $147,000 already deposited) with the Clerk "of the United States Circuit Court, upon which the "Court entered a decree confirming the sale and "directing the Special Master to execute and deliver "a deed for the property to the purchasers, and "further directing the Receiver to deliver posses-"sion of the road to them" (p. 1529). The records of the First National Bank of Omaha showed that on October 24, 1891, G. W. Wickersham made a special deposit there of $2,286,000 N. & W. bonds, and on October 30th a like deposit of $150,000 N. & W. bonds, which were withdrawn and delivered to him on October 30th, the count verified by Frank M. Clarke, paying teller of the bank, who testified that he went with Wickersham to the U. S. Circuit Court and there turned them over to the Clerk of the Court (see also pp. 1718–1721).

On cross examination, Garretson testified as follows:

"Q. Did you not deliver those bonds to me (Mr. Wickersham) as the representative of J. Kennedy Tod & Co. in order to complete the pledge of the bonds under the million dollar loan agreement?

A. I guess those bonds were to be included behind the million dollar loan.

Q. The million dollar loan covered all of the Nebraska Western bonds, didn't it?

A. It seems to.

Q. Now, then, it is your recollection that you delivered those bonds to me on behalf of J. Kennedy Tod & Co. in Omaha?

A. I presume I did" (pp. 769–70).

The testimony on this point has been summarized somewhat at length, because of the extraordinary misstatements made by appellant's counsel in their Brief on Facts, in the Court of Appeals, at pages 42 to 47. They first refer to the delivery of the bonds to Mr. Wickersham as "*a most remarkable*

"*contrivance. It was wholly unnecessary, for the* "*agreement provided that the purchase by trustees* "*should be equal security in place of the bonds*" (P. R., 648, p. 44). As above pointed out, the agreement provided for the delivery of the bonds in the first instance to the bankers as security for the notes (p. 647), and *then*, that if the bonds had to be deposited in court, either the road should be purchased by trustees, *or* Garretson should bid it in and assign his bid (p. 648).

They then add: "*But the transaction is more re-* "*markable in this: Mr. Wickersham not only knew* "*that the bonds came from Sioux City, but the de-* "*livery which he obtained was by express receipts* "(P. R., 1718-21), *showing that they came from the* "*Union Loan and Trust Company* (Ex. 91-93, P. R. "1102-3), *right where he knew they must come from,* "*and from an institution which he had notice held* "*them in pledge. The device could serve but one* "*purpose, and that was to cut off an antecedent* "*equity by a subsequent delivery, and it could be* "*effective as against but one owner from whom* "*Garretson in his office as vice-president, might* "*be ostensibly relied upon as having authority, and* "*yet who was not to be believed, for if he did own* "*and was trustee there was no need of this device.* "*This was practiced at the very bar of the Court by* "*a trustee for the benefit of the bondholders, whose* "*title he thus diverted*" (p. 44).

In so far as this paragraph purports to state what the evidence adduced discloses, it is a deliberate misstatement.

The reference to P. R. 1102-3 shows *that the express receipts produced were not those upon which Mr. Wickersham obtained delivery of the bonds,* but the receipts *given to the Union Loan and Trust Compang* upon shipment of bonds marked "A. S. Garretson, Omaha, Neb." (Petr.'s Ex. 91, 92, pp. 1102-3), *which receipts were never delivered to Mr. Wickersham, but remained in the Union Loan and Trust Company, until they were produced from its*

archives by the counsel for its assignee, and by him offered in evidence in this cause (pp. 846-7)!!

The reference to pages 1718-21 is to the deposition of John H. Bexten, clerk in the First National Bank of Omaha, showing that certain packages of bonds were delivered to said bank by the American Express Company and then delivered to Mr. Wickersham, who made a special deposit of them with the bank.

"Q. Any of those bonds come from the Union Loan and Trust Company at Sioux City, Iowa? A. Don't know where they came from."

There is not one word of evidence to support the further statement that Mr. Wickersham knew the bonds must come from the Union Loan and Trust Company, "an institution which he had notice held "them in pledge." The further statement imputing to counsel an intention by his acts in carrying out the instructions of his clients in conformity with their contract with Garretson to improperly cut off the alleged antecedent equity of the said Trust Company, and thus practice a fraud "at the very bar of the Court," is so gratuitous, that it ought to bring the counsel who penned it to the bar of the Court to answer for most unprofessional conduct. But offensive and unprofessional as these matters are, the counsel go even farther by adding:

"There only remains to notice *that the design* "*was so subtly executed that it escaped Garretson's* "*notice*, whose testimony shows that if it occurred "he did not remember it, but thought that he himself "had the bonds and delivered them in the purchase "(P. R., 741-2). Well he might, for his contract "so contemplated (P. R., 648)." (Brief on Facts, p. 45.)

The first reference is to GARRETSON'S direct-examination on behalf of the petitioner in August, 1894, three years after the transaction in question. His testimony is as follows:

"By Mr. Coombes: Mr. Garretson, the Nebraska

and Western Road was foreclosed during the time that the bonds were in the hands of Kennedy, Tod & Co., wasn't it? A. Yes, sir.

Q. At the time of that foreclosure, without raising any question now as to Kennedy, Tod & Co.'s lien or claim of lien, who owned all the stock and bonds of the Nebraska and Western? A. They were owned by the railroad syndicate.

Q. Was that road sold on foreclosure proceedings? A. Yes, sir. * * * It was purchased in the name of Mr. Wickersham and myself, trustees.

Q. * * * Why didn't you deed it to yourself alone? A. Well, by reason of this loan of a million dollars procured of Tod & Co.; they had a large interest that was in the nature of an unsettled, not in a completed form, and Mr. Wickersham, as I understand it, joined me in the purchase by reason of that condition of affairs with Tod & Co.

Q. As representative of their interests? A. Yes, sir" (pp. 739-40).

"Q. Do you know whether the consideration was in money or in any other form? A. The consideration at the Master's sale was the surrender to the Court of the bonds and stock of the Nebraska and Western Railway Co.

Q. And who surrendered those *certificates?* A. *I* made the surrender of them?" (pp. 741-2.)

On *cross-examination*, Garretson testified that when the million dollar loan agreement was signed, about half a million dollars of the Nebraska and Western Railway Company were at the Union Loan and Trust Company of Sioux City.

Q. Now, what was done with this $500,000 of bonds that were in Sioux City? A. They were sent to Omaha at the same time the other bonds were sent.

Q. Who sent them? A. Mr. Smith.

Q. At your request? A. It was either at my request or the request of some member of the syndicate.

Q. *You told Mr. Smith of the million dollar loan, of course?* A. *Yes, sir.*

Q. *He knew all about it?* A. *Yes, sir.*

Q. And he sent the bonds to Omaha, and they were sent in whose name, and sent to whom? A. I don't know; they were evidently sent in my care.

Q. Do you remember what you did with them? A. They were all put together and delivered to the Court.

Q. Yes, but before they were delivered to the Court, do you recollect what you did with them? A. They came by express.

Q. And when they were taken out of the express company's office where were they taken to? A. To the United States Depository of the First National Bank, if I remember right now.

Q. Did you not deliver those bonds to me (Mr. Wickersham) as the representative of J. Kennedy Tod & Co., in order to complete the pledge of the bonds under the million dollar loan agreement? A. I guess those bonds were to be included behind the million dollar loan.

Q. The million dollar loan covered all of the Nebraska and Western bonds, didn't it? A. It seems to.

Q. Now, then, is it your recollection that you delivered those bonds to me on behalf of J. Kennedy Tod & Co. in Omaha? A. *I presume I did.*

Q. Then Mr. Garretson, you and I acted as a committee to purchase the property? A. Yes, sir.

Q. With the understanding that I represented the interests of J. Kennedy Tod & Co. as pledgees of the bonds, and you as pledgor of the bonds, was it not? A. I think so (pp. 769–771).

If now we read again the provisions of the million dollar loan agreement (p. 646), particularly articles first (p. 646), and third (p. 647), Tod's telegram to Garretson on October 22 1891, "Wickersham advises execution all papers. They have not arrived yet, *but if you will deliver stock and balance of*

bonds to him we will place cash at his disposal" (p. 1125). Garretson's dispatch to Tod on October 23d: "One hundred and fifty (of its) bonds yet in New York held by St. Charles Car Company. * * * *Balance of the bonds here subject to the order of Mr. Wickersham"* (p. 994), and the testimony of the clerks of the First National Bank of Omaha (pp. 1718-20), quoted above, it will be apparent how willful an attempt to mislead the Court is embodied in the paragraph from page 45 of appellant's brief above quoted. This is perhaps the most glaring of all the misstatements of evidence in the appellants, as it is certainly the most offensive to appellee's counsel, and we have therefore devoted some space to pointing out the extent to which it errs against truth and the proper professional presentation of a case. The brief is filled with similar mistatements of less glaring nature, but altogether presenting a distorted image of the evidence in the cause, which it would take a large volume to point out in detail. We must therefore content ourselves with presenting to the Court a careful, and we believe, accurate summary of the evidence on the various points dwelt upon by the appellant as the foundation to his claim to relief.

On October 26, 1891, Tod & Co. wrote Garretson acknowledging receipt of his check for $10,000 (in payment of the commission due them under paragraph eleventh of the loan agreement), and stating *"The 200 notes of $5,000 each, say $1,000,000, came safely to hand.* We have credited your account with $1,004,166.67 in payment of the notes at par and accrued interest. We have debited your account with $433,765.80, in payment at par and interest of the various notes which you instructed us to take up. You will please examine the enclosed memo. at your earliest convenience and report to us if you find it in order. * * * *When we hear by letter from Mr. Wickersham regarding the delivery of the bonds and stock of the Nebraska & Western Railroad we will send you a receipt covering these*

securities. In the meantime we enclose formal receipts for 7,200 shares of the Sioux City & Northern Railway Company stock, which have been delivered to us. We also enclose the notes referred to in the memorandum" (Petr.'s Ex. 21, pp. 993-5).

Notes of Garretson Paid out of MillionDollar Loan to release N. & W. Bonds and S. C. & N. Stock.

The notes so paid, a memorandum of which was enclosed in said letter (p. 995), were notes of A. S. Garretson, to secure the payment of which there had been pledged the $800,000 of Nebraska & Western bonds which W. S. Tod testified he received from The Manhattan Trust Co.; and the note for $76,000 held by Tod & Co., as collateral to which $200,000 of said Nebraska & Western bonds had been pledged; and four notes of $12,500 each, aggregating $50,000, held by the Manhattan Trust Company, secured by 2,000 shares Sioux City & Northern stock as collateral (Petr.'s Ex. 13 d to t, pp. 955-975; Ex. 12, p. 951; Ex. 13f to 13j, pp. 957-962), WHICH 2,000 SHARES, BEING CERTIFICATES NOS. 10 TO 13, 500 SHARES EACH, IN NAME OF A. S. GARRETSON, FURNISHED A PORTATION OF THE 7,200 SHARES PLEDGED UNDER THE LOAN AGREEMENT OF OCTOBER 1, 1891.

Delivery of 5,200 Shares S. C. & N. Stock.

Delivery of the balance of the Sioux City & Northern stock pledged under the agreement, viz., 5,200 shares, was made as follows:

On October 8, 1891, E. R. SMITH, SECRETARY of the UNION LOAN & TRUST COMPANY, wrote to Tod & Co. as follows: "We are in receipt of a telegram "from Mr. A. S. Garretson requesting us to send "you $520,000 stock of the Sioux City & Northern "Railway Company *as collateral to a loan which* "*he is making with you.* We have not certificates "in hand, so that we can send you just that amount, "but send by express $500,000 stock of that com- "pany, and will endeavor to get the balance, $20,- "000, as soon as we can get one certificate divided "up. *You can consider, in the meantime, that we* "*will hold that amount of stock in trust for you*" (Intv. Ex. 20, p. 662). And on the same day he wrote: "*Agreeable to our letter of this date* we en-

"close herein the following described certificates "of stock in Sioux City & Northern Railroad Com- "pany:"

Ten certificates for 500 shares each were enclosed in this letter, three being in the name of Hedges, three in Booge's, two in Haakinson's and two in Hornick's.

(Petr.'s Ex. 21, pp. 662-3).

On October 12th, Tod & Co. wrote acknowledging the receipt of said letter and the stock, calling attention to the fact that the assignment of certificates 31 and 32 in the name of Ed. Haakinson was neither dated nor witnessed, and requesting Smith to have power of attorney which they enclosed, executed and returned to them (Petr.'s Ex. 9, p. 655).

On October 22d E. R. SMITH, SECRETARY of the UNION LOAN & TRUST COMPANY, wrote Tod & Co. enclosing certificate No. 41 in name of "A. S. Garretson, Trustee," for 200 shares "*balance of stock due you as per our former letter;*" and stating that in place of signing the power of attorney sent them October 12th they had concluded to send other certificates in lieu thereof, and they, therefore, enclosed certificates 29 and 30, 500 shares each (in the name of Ed. Haakinson) and asked return of Nos. 31 and 32 (the assignment of which had not been dated or witnessed, as above noted), and they also enclosed certificates Nos. 36, 37 and 58 for 500 shares each (in the name of John Hornick) and asked in exchange the return of certificates Nos. 22, 23 and 24 for 500 shares each in the name of James E. Booge (Intervr. Ex. 24, p. 664).

On October 26, 1891, Tod & Co. acknowledged to E. R. Smith, secretary of the Union Loan & Trust Company, receipt of said letter of October 22d with certificates enclosed as stated, and returned to them the certificates for 2,500 shares as requested (Petr. Ex 12, p. 657).

On October 31, E. R. Smith, secretery, acknowl-

edged to them receipt of the 2,500 shares (Petr. Ex. 25, p. 665).

The result of such deliveries and exchanges was, that Tod & Co. held, as collateral under said loan agreement, the following certificates of Sioux City and Northern Railroad stock:

	SHARES.
Nos. 10 to 13, 500 shares each, name of A. S. Garretson	2,000
Nos. 16, 17, 18, 500 shares each, name of D. T. Hedges	1,500
Nos. 34, 35, 36, 37 and 38, 500 shares each, name of John Hornick	2,500
Nos. 29 and 30, 500 shares each, name of Ed. Haakinson	1,000
No. 41, name of "A. S. Garretson, Trustee,"	200
Total	7,200

On October 26th they wrote Garretson advising him "that 7,200 shares of $100 each of the capital Stock of the Sioux City and Northern Railway Co. have been delivered to us in negotiable form" (Defts.' Ex. 145, p. 1547). The shares in the name of A. S. Garretson, "Trustee," were those which represented the interest which Jas. E. Booge had had in the syndicate, he having failed, and his interests in the syndicate being taken over by the other members (pp. 789-90).

Sioux City, O'Neil & Western Railway Co.

The Sioux City, O'Neill & Western Railway Company was organized after the said Nebraska and Western foreclosure sale, for the purpose of acquiring and operating the said railroad. A delay of some thirty days after the sale was made necessary by the laws of Nebraska, before its organization could be perfected and the bond sand stock issued. The loan agreement having provided that until the new corporation should be formed and the new bonds and stocks delivered, no amount in excess of $600,000 arising from the sale of the notes should be paid over to Garretson, the latter telegraphed and wrote

to Tod & Co. on November 12, 1891, asking them to waive such provisions, saying: "*You have certificate of purchase which controls the bonds and all the stock*, and I will send the Bridge stock tomorrow, *and other collaterals, if it is a question of security.* I must have some advances further, as my promises are out" (Defts.' Ex. 136, p. 1540).

Tod & Co. replied on November 13th objecting to Garretson's having already ignored the contract by making drafts on them in excess of the contract limit, stating that they had no authority to vary the terms of the loan, but that they appreciated his dilemma and were willing to make him a loan for a reasonable amount, but that that was a matter to be arranged *before*, not *after* using it (Petr.'s Ex. 23, p. 996).

On November 13th Garretson wrote them, sending, by express, certificates Nos. 46, 47 and 48 for five hundred shares each of the stock of the Sioux City and Northern Railroad Co., in the name of "A. S. Garretson, Trustee," stating: "*This stock is in my possession because it has not been paid for by the party for whom I am trustee and I have a right to assign it and hypothecate it;*" and enclosing his note for $75,000 at sixty days, with the said stock as collateral, adding: "*I have plenty of securities and may have to wire you for further advances.* I have left the rate of interest blank in the note for $75,000 and you are authorized to fill in such rate of interest as is necessary to charge for this advance" (Deft.'s Ex. 137, pp. 1540-1541).

Temporary Loan, Tod & Co. to Garretson, $75,000 on 500 shares S. C. & N. Nov. 13, 1891.

On November 16th Tod & Co. acknowledged the receipt of said stock and note which they had decided should carry interest at the rate of *five* per cent. per annum, and stated that they had credited his account with $75,000 (Peter.'s Ex. 25, p. 999).

Temporary Loan, Tod & Co. to Garretson. $150,000 on 500 shares S. C. & N., Dec. 3, 1891.

On December 3d they made him a further loan of $150,000 on his three notes for $50,000 each, payable *on demand*, with interest at *five* per cent.; receiving as collateral therefor 3,555 shares of Sioux City and

Northern Railroad stock (Ptr.'s Ex. 28, p. 1000). The said 3,555 shares of stock were sent to J. Kennedy Tod & Co., enclosed in a letter from E. R. SMITH, SECRETARY OF THE UNION LOAN & TRUST COMPANY, dated November 30, 1891, stating that they were sent "*Agreeable to request of A. S. Garretson.*" The certificates were in the names of Hedges, Haakinson, Hornick and Garretson respectively, except 1,178 shares in the name of "A. S. Garretson, Trustee."

(Int. Ex. 26, p. 665).

The organization of the SIOUX CITY, O'NEILL & WESTERN RAILROAD was completed December 1, 1891, F. C. Hills being elected president, and A. S. Garretson treasurer of the company. Mr. Wickersham was *not* a director, as stated in appellants' brief on facts (p. 45). See supplement to record page 2. Pursuant to resolutions of the directors and stockholders of said company, Messrs. Garretson & Wickersham, as trustees for the holders of the first mortgage bonds of the Nebraska & Western Railroad Company, conveyed to the said Sioux City, O'Neill & Western Railroad Company, the railroad and property purchased by them at said foreclosure sale, and Garretson transferred to said company 20,000 shares of the capital stock of the Pacific Short Line Bridge Company, in consideration of the issue of $2,340,000 first mortgage five per cent. bonds of the said Sioux City, O'Neill & Western Railroad Company, and 36,000 shares of its capital stock (Deft.'s Ex. 9, p. 1648; Deft.'s Exs. 4, 5, 6, 7, September 13, 1894, p. 1590–1; Printed Supplement to record, p. 4).

Issue of Sioux City, O'Neill & Western Bonds and Stock.

The MORTGAGE (Defendant's Ex. 4, p. 1110), which was dated December 7, 1891, and duly acknowledged and recorded, provided that "Whereas, "The said bonds so to be issued are to be engraved "and may not be ready for execution immediately, "the said Railway Company may prepare and issue "temporary printed bonds in substantially the form "aforesaid, in amounts of $1,000 each or any mul-

Sioux City O'Neill & Western Mortgage.

Temporary Printed Bond.

"tiple thereof each, to secure in the aggregate a "sum not to exceed $2,340,000, which bonds shall "be exchanged for an equal amount in the en- "graved bonds when the same are ready for issue, "and the said temporary bonds shall be as fully and "effectually secured by this indenture as said en- "graved bonds" (pp. 1114-15).

The form of bond authorized by the mortgage contained the usual provision that "*This bond shall "not become obligatory until authenticated by the "certificate endorsed hereon duly signed by the "Trustee*" (p. 1112).

A TEMPORARY PRINTED BOND was prepared under this provision, for $2,340,000, reciting that it would be exchanged for a series of 2,340 engraved bonds of $1,000 each, of the same date, securing in the aggregate the sum of $2,340,000, &c., as soon as said engraved bonds could be prepared and ready for delivery (Deft.'s Ex. 109, p. 1508), which temporary bond was signed by F. C. Hills, President of the Company, in the office of Wright & Hubbard in Sioux City on December 7th, 1891 (pp. 1588-9), and was forwarded by Mr. Wright, by mail, to either Strong & Cadwalader or George W. Wickersham (p. 1612). It was then certified by the trustee, and delivered on December 14th, 1891, to J. Kennedy Tod & Co. (p. 1284), *and received by them as collateral under the million dollar loan* (p. 1356).

Delivery of Temporary Printed Bond to Tod.

On Dec. 21, 1891, Garretson wrote to the Manhattan Trust Company stating that he had had 500 of the Sioux City, O'Neill & Western engraved bonds sent to it for signature as trustee, the balance of the issue to follow soon. When certified, to deliver same to Tod & Co. and take up and cancel the temporary bond (Defts.'s Ex. 10, p. 1509). On Dec. 26th the Trust Company acknowledged receipt of the bonds, but stated that as the temporary bond was for the entire amount, Tod & Co. declined to surrender it until the whole issue of engraved bonds was ready for delivery (p. 1511).

On January 19, 1892, the said temporary bond (Defts.' Ex. 109, p. 1508) was surrendered to the Manhattan Trust Company and canceled, and 2,340 engraved bonds, of $1,000 each, certified by the trustee and delivered to J. Kennedy Tod & Co. in exchange therefor, *which bonds were received by them as collateral under the agreement aforesaid* (p. 1357).

On January 21, 1892, the Secretary of the Manhattan Trust Co. wrote to F. C. Hills, president of the Sioux City, O'Neill & Western Railway Co.: "We beg to state *that we have certified and delivered to Messrs. J. Kennedy Tod & Co., on the 20th January, 1891, $2,340,000 engraved first mortgage, five per cent. bonds of your company, in exchange for the temporary printed bonds for $2,340,000 surrendered to us and canceled by us.* We will hold said canceled bond in our files" (Defts.' Ex. 114, p. 1511), and on Jan. 29, 1892, Hills replied: "I am in receipt of your favor January 21st, stating that you have certified and delivered to Messrs. J. Kennedy Tod & Co. $2,340,000 engraved first mortgage five per cent. bonds of the Sioux City, O'Neill & Western Railway Co., in exchange for the temporary printed bond for same amount, which has been surrendered to you and canceled by you, and advising that you will hold said canceled bonds in your files" (Defts.' Ex. 111, p. 1510).

The said engraved bonds were held by J. Kennedy Tod & Co. from the time of such delivery to them, until the million dollar loan was paid off, at which time they were delivered to themselves, as trustees under the $1,500,000 loan agreement (pp. 1357–1284) *and have been in their possession ever since.*

DURING ALL THE TIME THE SIOUX CITY, O'NEILL AND WESTERN BONDS AND THE 7,200 SHARES SIOUX CITY AND NORTHERN STOCK WERE HELD BY MESSRS. TOD & CO. UNDER THIS LOAN, A PERIOD OF UPWARDS OF A YEAR, NO OBJECTION OR INQUIRY WAS MADE BY ANY MEMBER OF THE SYNDICATE, OR BY ANY OFFICER OR STOCKHOLDER OF THE UNION LOAN AND TRUST CO., OR BY ANY OTHER PERSON.

The loan was paid off, as above stated, in January, 1893, the amount to discharge the same being raised by the fifteen hundred thousand dollar loan above referred to, the notes representing which were, as has been shown, sold to and are held in large part *by parties other than those holding Garretson's notes forming the million dollar loan.*

Union Loan and Trust Company's knowledge of and participation in these transactions.

Union Loan and Trust Co.'s knowledge and participation in foregoing transactions.

ALL THE FOREGOING TRANSACTIONS WERE HAD WITH THE FULL KNOWLEDGE AND ASSISTANCE OF E. R. SMITH, THE EXECUTIVE AND ONLY ACTIVE OFFICER OF THE UNION LOAN AND TRUST COMPANY. THE CONTRACTS AND THE ACCOUNTS BETWEEN GARRETSON AND J. KENNEDY TOD & CO., WHICH SHOWED IN DETAIL THE ENTIRE TRANSACTION, WERE KEPT BY GARRETSON WITH THE UNION LOAN AND TRUST COMPANY, WHERE ANY OTHER OFFICER OR DIRECTOR COULD HAVE SEEN THEM HAD THEY EXAMINED THE RECORDS OF THE COMPANY.

Garretson testified on behalf of the petitioner that Smith knew perfectly the facts concerning the loans of $1,000,000 and $1,500,000 respectively; and that he had the accounts sent by J. Kennedy Tod & Company from time to time in his possession, they being sent by Garretson to Smith as they were received (pp. 746–7, 759, 107–8). *This was not contradicted by Smith;* and the larger part of the accounts which were produced by petitioner's counsel and offered in evidence, came from the office of the Union Loan & Trust Co., where they were found by the assignee when he took possession at the time of its failure, *although petitioner's counsel having carefully abstained from keeping them separate so that those which came from the office of the Trust Company could be distinguished from those which came from other sources,* it was im-

possible to tell exactly which of them were found at the time of the failure in the Trust Company (pp. 935-6).

Sale of 3,600 shares Sioux City & Northern stock to Great Northern Ry. Co., April, 1893.

In April, 1893, J. Kennedy Tod & Co. released and delivered unto A. S. Garretson 3,600 shares of the capital stock of the Sioux City and Northern Railroad Company under the authority conferred in Article Third of the Indenture of Trust, dated December 31, 1892 (*vide*, p. 632 and *supra*), which Garretson sold to the Great Northern Railway Co. for $350,000 (pp. 432-1027).

This sale was also made with the knowledge and concurrence of Smith, and the proceeds were actually paid by Garretson to the Union Loan and Trust Co., with directions to apply $200,000 thereof to pay notes of the Sioux City Terminal Railroad and Warehouse Co. and the balance to pay notes of the Syndicate, all of which were endorsed by the Union Loan and Trust Co. (p. 778).

Of the avails of the $1,500,000 notes of the Bridge Co. endorsed by Garretson, after paying the previous loan of $1,000,000, and the commission to the Union Debenture Co., about $200,000 was applied to the estimates of the bridge contractors, and the *balance Garretson paid to the Union Loan and Trust Co., with directions to apply to payment of Syndicate paper endorsed by the Union Loan and Trust Co.* (p. 778).

Garretson's use of Union Loan & Trust Co. vaults for safe keeping.

The evidence abundantly shows that Mr. Garretson and the other members of the Syndicate used the vaults of the Trust Company as a convenient place of safe deposit, and there is no competent evidence to rebut the presumption that the securities which were physically seen from time to time in that place, were there for a purpose not prohibited by the charter of the company, and not inconsistent with the theory that the officers of the company acted legally, and not unlawfully, in delivering them to Garretson or on his order, as they did. The original agreement of the Syndicate to build the Sioux City and Northern Road, provided that it

should be left with the Union Loan and Trust Co. *until its conditions were fulfilled, and its surrender agreed upon by the parties* (Ex. 1, p. 941 *ut supra*). Garretson left all of his statements of account there, and his letters; the uncertified engraved bonds of the Sioux City, O'Neill and Western Railway Co. were signed by the officers of the S. C., O'N. & W. Ry. Co. there, and from thence despatched to the Manhattan Trust Co. for certification and delivery to Tod & Co., in exchange for the printed bond; and, upon the failure of the Union Loan and Trust Company, the *only* records found by its assignee of the securities in controversy ever having been *in the possession of the said Company* consisted of a large envelope endorsed "S. C. & N.," which contained five other envelopes which were respectively endorsed as follows:

(1.) "A. S. Garretson.
Certificates of stock S. C. & N. R. R., Nos. 10 to 15, inclusive, for 283,788 shares."
(*In red.*) "Sent to A. S. G. at N. Y., July 10, '91."

(2.) "D. T. Hedges.
Certificates of stock S. C. & N. R. R., Nos. 16 to 21, inclusive, for 28,378 shares."
(*In red.*) "Sent to A. S. G., at N. Y., July 10, '91."

(3.) "Jas. E. Booge.
Certificate of stock S. C. & N. R. R., Nos. 22 to 27, inclusive, for 28,378 shares."
(*In red.*) "Sent to A. S. G., at N. Y., July 10, '91."

(4.) "Ed. Haakinson.
Certificate of stock S. C. & N. R. R., Nos. 28 to 33, inclusive, for 28,378 shares."
(*In red.*) "Sent to A. S. G., at N. Y., July 10, '91."

(5.) "John Hornick.
Certificates of stock S. C. & N. R. R., Nos. 34 to 39, inclusive, for 28,379 shares."
(*In red.*) "Sent to A. S. G., at N. Y., July 10, '91."

THE ENDORSEMENTS IN RED WERE IN THE HANDWRITING OF E. R. SMITH, THE SECRETARY AND TREASURER OF THE UNION LOAN AND TRUST COMPANY (*p.* 1728).

There were also two receipts in the following language:

"OCT. 3, 1891.

"Rec'd of U. L. & T. Co., 1,312 shares of stock S. C. & N. R. R. Co., to use in securing claim of Pacific Short Line purchase, of which 312 shares are to be returned and balance to be deposited as said security.

"C. L. WRIGHT."

"*Nov. 13, 1891.*

"Rec'd. of U. L. & T. Co. the following described stock of S. C. & N. Ry. stock as follows:

500 shares No. 48. Name: A. S. Garretson, trustee.
500 " " 47. " " "
500 " " 46. " " "

"SAME TO BE LODGED WITH KENNEDY, TOD & CO. UNDER TERMS OF CONTRACT BY SAID KENNEDY, TOD & CO. AND A. S. GARRETSON.

"A. S. GARRETSON" (pp. 1726–7).

These envelopes and receipts were exhibited by the assignee to Mr. L. G. Hurd, one of defendant's counsel, in November, 1893 (pp. 1726–8). They afterwards disappeared, and no trace of them could be obtained by defendant's counsel when testimony was being taken in the cause (pp. 1672–3).

J. K. Tod testified that he supposed that the Union Loan & Trust Company was merely a place of safe deposit of the securities, the custodian of the securi-

ties for the owners, as it was customary with his firm to receive securities for account of clients with whom they dealt, from trust companies and similar institutions. It was almost universal for clients to have their securities sent to trust companies or some safe deposit institution, unless they themselves were large organizations and had burglar and fireproof safes in their offices (p. 1457).

Garretson testified that the syndicate always regarded the bonds of both the Sioux City & Northern and the Sioux City, O'Neill & Western R. R. Co.'s for sale, and the three quarters interest in the Sioux City & Northern stock. It was their expectation to retain a one-quarter in the Sioux City & Northern property, but they had to abandon that (p. 797), and that it was the understanding of the syndicate that they were to have the use of the securities for pledge or sale according to their interests in developing their enterprises (p. 798). He further testified that E. R. Smith, the secretary and treasurer, very largely ran the Trust Co.

Q. And so far as these transactions went—these syndicate transactions went—Mr. Smith did what you told him, wasn't that it?

A. Well, hardly that.

Q. Did he exercise an independent judgment and action?

A. Yes, sir. Mr. Hedges was with Mr. Smith a great deal in those matters.

Q. *And you kept him informed as to what the syndicate was doing from time to time?*

A. Yes, sir.

Q. *And as to the loans you were making in New York?*

A. Yes, sir.

Q. And as to the sale of the Sioux City and Northern bonds in New York?

A. Yes, sir.

"Q. *And as to the sale and pledge of the Sioux City and Northern stock in New York?* A. *Yes, sir.*

"Q. And when you wanted the securities for the

purpose of carrying out those negotiations, you went to him or sent to him and got them? A. Yes, sir" (p. 786).

This testimony was not denied by Smith; nor did petitioner's counsel examine him as to the facts so testified.

Syndicate authorized or ratified all of Garretson's acts.

All of these transactions between Garretson and Tod & Co. were either known to the remaining members of the syndicate—his partners—or were afterwards reported to and ratified by them.

HORNICK undertook to testify that when he first learned that Garretson had hypothecated the Sioux City and Northern bonds, he objected to it, *but he admitted that he did not give any notice to the party to whom Garretson had pledged them. He acquiesced in and ratified what had been done* (p. 904).

HAAKINSON admitted that he understood the syndicate notes were to be paid by the sale of stocks and bonds of different enterprises the Syndicate was in; that is that it was contemplated that the proceeds of this paper were to be used in acquiring railroad property; and that the stock and bonds of the property were to be sold and the proceeds used to take up these notes, and in that transaction Mr. Garretson was the active member of the Syndicate, and he left it all to him (pp 911-12).

HEDGES admitted that he knew about the million dollar loan made to Garretson, by J. Kennedy Tod & Co., and about the loan of a million and a half of dollars later (pp. 1712-13).

That in December, 1890, when he was traveling with Garretson to New York, he learned that Garretson had taken the $750,000 of Sioux City and Northern bonds and put them behind the Belmont loan of $500,000 (pp. 1712-13).

That Garretson was the financial manager of the syndicate, and the management was pretty much left to him by the other members of the syndicate,

who usually made notes when he called for them, and he received for the syndicate the collateral of the different properties as it was acquired.

That after learning that he had pledged the 750 S. C. & N. bonds, they made a fuss about it, but Garretson said: "By gum, boys, if you will stay by me, "we will pull you through," so we consented. * * * After considering the pros and cons we ratified what he did (p. 1714).

ALL OF THE MEMBERS OF THE SYNDICATE signed the agreement with the Pacific Short Line Bridge Company dated December 31, 1892, under which the $1,500,000 notes secured by the pledge to Tod & Co. were issued (Deft.'s Ex. 36, Aug. 30, 1894, p. 1494, *et supra*).

HORNICK admitted that he read the said agreement before he signed it, understanding that the necessity for its execution was to ratify some of Garretson's transactions (pp. 899-900). That he knew when he signed it that the collateral named in that paper was to be used for the purposes named therein (p. 1686).

It is quite apparent from the foregoing evidence that the syndicate embarked first in the Sioux City and Northern, and later in the Nebraska & Western enterprise under the partnership agreements above referred to, with the general understanding that the securities earned by construction, or acquired by purchase, should be used to raise funds to pay off its obligations or pledged in furtherance of the purposes of the enterprise; that so far from the securities being actually pledged to the Union Loan and Trust Company, for the payment of syndicate notes, there was not even a verbal *agreement* that they should be pledged, *but merely a general understanding that all of those securities should be sold or pledged in furtherance of syndicate enterprises; that securities resulting from their operations were from time to time lodged in the Trust Com-*

pany for safe keeping, withdrawn by Garretson when he wanted them, and sold, as he arranged: the proceeds sometimes applied towards the liquidation of the syndicate account, sometimes towards the bridge construction, and sometimes to take up loans Garretson had made secured by pledges of the syndicate property. Such securities were delivered to Garretson freely and without objection whenever he asked for them, and were pledged with full knowledge on the part of the only officers of the Trust Company who had any knowledge of its affairs to secure loans, all of which were applied towards the purposes of the syndicate. It must be added, in justice to Garretson, that there is no evidence to show that one dollar of the moneys raised by him on the pledge of syndicate collateral was applied to his personal use or to any purposes other than the legitimate ends of the syndicate undertakings.

IT AFFIRMATIVELY APPEARS THAT $1,000,000 OF THE NEBRASKA & WESTERN R. R. BONDS NEVER WERE, AT ANY TIME, IN THE POSSESSION OF THE UNION LOAN AND TRUST COMPANY, AND THAT NONE OF THE SIOUX CITY, O'NEILL AND WESTERN BONDS EVER WERE.

Only part of Nebraska bonds and none of O'Neil & Western ever in custody of Union Loan and Trust Co.

E. R. Smith's misleading and disingenuous testimony that the engraved bonds of the last named road were returned to the Trust Company after the foreclosure sale of the Nebraska & Western R. R., was exploded by his admission, on cross-examination, that the bonds had not then been certified by the trustee (*without which they had no validity*); and by proof of the *previous* execution, certification and delivery of Tod & Co. of a temporary printed bond, under the provisions of the mortgage, which they held until exchanged for the engraved bonds, delivered to them as soon as certified by the trustee under the mortgage.

The only evidence to show that there was any agreement that the securities earned by the syndi-

cate were to be be pledged to or held by the Union Loan and Trust Company consists in affirmative replies of Smith and members of the syndicate to questions artfully framed by the appellant's counsel to elicit, not the *facts*, but the *conclusions* he desired to establish; such as the questions put to Smith, and quoted on pages 62-63 of this brief.

The Holders of Syndicate notes endorsed by Union Loan and Trust Company have shown no special equities as to the securities in controversy.

Holders of large number of notes purchased same after collaterals pledged to appellees.

THE HOLDERS OF THE LARGER NUMBER OF SUCH NOTES PURCHASED THE SAME *after* THE SECURITIES HAD BEEN PLEDGED TO THESE APPELLEES.

A list of the holders of such notes, outstanding at the time of the failure of the Union Loan & Trust Company will be found on pages 1130 to 1142 of the printed record. ALL *of the notes were issued* AFTER SEPTEMBER 1, 1892, *and therefore at a time when* ALL OF THE SECURITIES IN CONTROVERSY, *except* 7,200 *shares of Sioux City and Northern stock*, WERE IN THE HANDS OF J. KENNEDY TOD & CO., AS PLEDGEES IN TRUST UNDER THE MILLION DOLLAR LOAN AGREEMENT OF OCTOBER 1, 1891. *A large part of the notes were made after the 1st of January*, 1893, *and therefore, after* ALL *of the collaterals in controversy, except the* 1,000 *shares of Sioux City and Northern stock sent by the Union Loan and Trust Company to Tod & Co. on January* 16, 1893 (p. 652), *had been delivered to Messrs. Tod & Co. for the purposes of the pledge to secure the Pacific Short Line Bridge notes for* $1,500,000, *endorsed by Garretson.*

NONE OF THE NOTES SOLD BY THE UNION LOAN AND TRUST COMPANY CONTAINED ANY REFERENCE TO COLLATERAL (pp. 937-81).

Notes outstanding at time of failure, not renewals of previous notes.

The effort to connect these notes with the paper issued before the pledge of the securities to Tod & Co. failed absolutely.

Miss Stevens, the former stenographer of the Union Loan and Trust Company, a witness for the petitioner, testified:

"Q. Suppose a bank held a note signed by John Hornick that was becoming due, would the Union Loan & Trust Company thereupon write that bank enclosing a note of the same amount made by the Union Stock Yards Company, for example, and write the bank saying: 'We enclose you herein Stock Yards note in exchange for the John Hornick note about falling due,' or would not all your transactions shown on your books and in your action, consider it a case of discount or sale of the new note in payment of the old note?

A. If the Union Loan & Trust Company was ordered by the bank holding the note, then they would write a letter saying that they exchanged note of such a maker in exchange of another maker maturing at such a date. Unless they were ordered so to do, the record simply shows that that note was paid and a new note sold direct. In a majority of cases they were not so ordered. *As a note was maturing it was usually paid. In a majority of instances the matter would take the form of a straight payment and a sale, and their books would show the same.* In case it was an actual exchange only the letter book would show the exchange" (pp. 1679-80).

Mr. Hubbard testified that it was impossible for him to tell as to any individual piece of paper whether any one of the notes outstanding at the failure of the Union Loan & Trust Co. was renewal paper. But the way in which the business was done by the Union Loan & Trust Company *was not ordinarily by a renewal of paper that was held in the hands of any bank, but by the payment of that paper, or the substitution of new paper therefor.*

That is, as an example, the bank would buy several pieces of paper, take a note made by D. T. Hedges, one made by the Sioux City Stove Works, one made by the Packing Company, the Sioux City Dressed Beef and Canning Company, and one by John Hornick, Trustee. When the paper matured, or usually prior to its maturity, new notes were obtained from these various concerns in anticipation of the maturity of their paper. *This paper would, in some instances, be sold and the money paid to the bank*, or the bank holding this paper would be induced to take other paper in exchange therefor. It might be the paper of the Union Stock Yards Company and other concerns, and in some instances there would be a direct renewal. That is, a piece of Hedge's paper would be renewed by another note of Hedge's and the interest paid. That was their general way of doing business. He would not state as to any specific piece of Syndicate paper (p. 1575).

"Q. *If I understand your answer it is that in general this paper was used to take up paper, and when so used, the paper would not be executed by the same maker as the paper taken up?*

"A. *I think that was the general custom*, as a matter of preserving credit, *that usually the paper was either paid or substituted by different paper executed by different makers.* It would be impracticable to state without a specific examination, whether *any* of the paper of the Railroad Syndicate so called, outstanding at the time of the assignment, was in fact renewal paper, which had been given to take up paper previously made by the same maker and held by the same creditor (p. 1576).

On cross-examination by his own counsel he was asked:

"Q. Now, when a Railroad Syndicate note became due, and if the transaction did not close by a payment, and if a new note was furnished the same bank, was it not the custom to furnish a note either signed by the same maker or by some maker, which

maker was in fact a maker produced by the Railroad Syndicate?

"A. That I could not say. *I do not think that a distinction of that kind was carefully observed. I think they substituted almost any paper that they had on hand.* The fact is, of course, that most of the paper handled by the Union Loan and Trust Company was Syndicate paper (p. 1579).

"Q. But where a Syndicate note, for instance a note of John Hornick, as a member of the Syndicate, was taken up, and another note placed right in its stead, so that there was not the transaction of a cash payment, would not the note that took its place be another Syndicate note, signed, for instance, by the Stock Yards Company or Dressed Beef and Canning Company, or by some party, person or corporation, secured through the Railroad Syndicate arrangement?

"A. I have not examined with relation to that, *but that is not my impression of the business, that that was necessarily the case.* I think that did follow in a great many instances—possibly in most instances. I don't think it was universally the rule. I think if a note of the Stove Works, for instance, happened to be more marketable than that of John Hornick or the Union Stock Yards Company, that they did not hesitate to put in that note and put the Hornick note or the Union Stock Yards note elsewhere. *In other words, I don't think that the course of business would indicate that they were careful with relation to the substitution of Syndicate paper for Syndicate paper*" (p. 1530).

He could not specify as to any particular case, as to any specific note, whether Railroad Syndicate paper proper was renewed by Syndicate paper, or the reverse (p. 1591).

The appellant, however, claims that his rights rise higher than those of his assignor and that he is entitled to enforce the equities of the holders of the notes of the Railroad Syndicate endorsed by the Union Loan and Trust Company, who, he claims,

purchased the same in reliance upon the circular letters issued by the company containing the false assertion that they held security for all paper they endorsed.

BUT THE EVIDENCE FAILS TO SHOW THAT ANY ONE OF THE BANKS HOLDING THE PAPER ENDORSED BY THE UNION LOAN AND TRUST COMPANY AT THE TIME OF ITS FAILURE, EVER SAW ONE OF THOSE CIRCULARS, STILL LESS THAT THEY READ THEM, OR BELIEVED THE STATEMENTS OR ACTED UPON THEM.

So that the statements by appellants' counsel in their brief on the facts, that the notes were "endorsed and negotiated by the Union Loan and Trust Company *on the faith of the security for the payment of the notes and the protection of its endorsement*" (p. 2); and that it rediscounted the paper it bought "on the most absolute and solemn assurances *to the takers* that it held ample collateral furnished by the makers to secure the payment of every piece of paper it thus endorsed and procured to be sold or rediscounted" (p. 21), are absolutely without foundation in the evidence.

The portions of the record cited by counsel to support them are (p. 690), where Garretson testified as to the general business of the Trust Co. (p. 821), where E. R. SMITH, having testified that the principal business in later years of the Union Loan and Trust Co. was buying and selling short time paper which was endorsed by the Union Loan and Trust Company, *whenever* it was sold to Eastern parties, was asked by petitioner's counsel:

"Q. *Was it for the most part negotiated in pursuance of a stereotyped circular?*

"Objected to as leading.

"A. Yes, sir.

"Q. I show you an exhibit which is already in evidence (being the circular above quoted from) * * * and ask you if that is the form of the circular that was used?

"Objected to as incompetent, immaterial and
"irrelevant.

"A. Yes, sir; it was (p. 821).

* * * * * *

"Q. Now I will ask you whether or no this rail-
"road syndicate passed any paper through the Union
"Loan and Trust Co. which was negotiated in pur-
"suance of such circulars as this?

"Objected to as incompetent, immaterial,
"irrelevant and not calling for the best evi-
"dence.

"A. It did" (p. 822).

But the record may be searched in vain for one syllable of evidence showing that any one of the 340 banks or their officers saw the circular, or read the statements therein contained; except the testimony of the stenographer of the trust company in response to leading questions that in each letter from the Union Loan and Trust Company in which was enclosed one of the Railroad Syndicate notes endorsed by the Trust Co. and sent to the purchaser thereof, there was also enclosed one of the circulars above referred to (p. 1674). *Not one officer or witness in behalf of any one of these 340 banks took the stand to testify that he had seen or read one of the circulars, or that any bank officer believed the statements contained in it, or that he had purchased paper relying upon them.* Indeed, as the circulars were enclosed with the letters sending the notes to the banks which they *had* ordered, if there follow a presumption that the circular was read, it is that it was read *after* the purchase, not before.

The only two representatives of any of the banks who testified, were THEOPHILUS KING, president of the National Bank of the Redemption, of Boston, Mass., which held $80,000 of said notes, and of the National Granite Bank of Quincy, Mass., which held about $10,000 of them (p. 534), and DANIEL E. PLUMER, president of the First National Bank of

Warsaw, Wis., which held about $45,000 of such notes (p. 864), and who is president of the Credits Commutation Company, the association of note holders (p. 883); *but appellant's counsel was very careful not to ask either of them a single question on this subject.*

On the other hand, it did appear that of the 340 banks who held the so-called Railroad Syndicate paper endorsed by the Union Loan and Trust Co., all but 15 had been regular customers of the Trust Co. for that kind of paper for years (p. 1675) and that none of the Railroad Syndicate notes sold, nor the letters transmitting them referred to any specific collateral (pp. 1676–8); while the charter of the Union Loan and Trust Company, in Article III., expressly provided, "*However this company shall not purchase nor loan its funds on the securities of any railroad company*" (Petr.'s Ex. 90, p. 1072).

IT WAS MOREOVER SHOWN THAT DURING THE FIVE YEARS WHILE THESE BANKS WERE BUYING PAPER FROM THE UNION LOAN AND TRUST COMPANY WITH BUT TWO EXCEPTIONS, NO ONE OF THEM HAD EVER *inquired* WHAT IF ANY SECURITY WAS BEHIND THE PAPER THEY WERE BUYING (pp. 1676–80).

It is therefore submitted that the evidence wholly fails to establish the prior lien of the Union Loan and Trust Company claimed by appellant.

The evidence fails to show that defendants took the securities in controversy with notice of the alleged lien of the Union Loan and Trust Co.

Basis of Appellant's claim that Tod & Co. took securities with actual or implied notice of alleged lien of Union Loan and Trust Co.

The appellants seeks to charge J. Kennedy Tod & Co. with notice of this alleged indefinite interest of the Union Loan and Trust Company—which, even after the failure of that company, with the members of the syndicate as their willing witnesses, their papers entirely at their disposal, and the records of the Trust Company at their command, they

have failed to define or establish—by methods which may be briefly characterized as *assumptions, adjectives* and *inferences. There is no pretence of direct proof.*

They base the allegation of notice upon the following considerations:

(1.) That Garretson had such a large amount of securities in his possession from time to time that appellees should have inferred that he had no right to them (Brief on Facts, p. 91).

(2.) That the officers of the Manhattan Trust Company, having a large interest at stake, by false representations of the condition of the Nebraska and Western Railway, induced Garretson to embark in that enterprise, and, in that connection, to wrongfully pledge the securities which were subject to the alleged lien of the Union Loan and Trust Company. That Mr. Wickersham, being one of the counsel to Manhattan Trust Company, must have known of all these alleged frauds, and that such knowledge is imputable to J. Kennedy Tod & Co., and prevents them from becoming *bona fide* holders (Brief on Facts, pp. 104–142).

(3.) That the transactions between Garretson and Tod & Co. were not in the *usual* course of business; it was a fraud on the Bridge Company to cause it to make the notes and contract for the $1,500,000 loan, and therefore the pledge of the securities gave Tod & Co. no rights against appellant.

(1.) WHO GARRETSON WAS, AND REASON TOD & CO. HAD TO DEAL WITH HIM AS A RESPONSIBLE PARTY WITH RIGHT TO DEAL IN SECURITIES OFFERED BY HIM FOR SALE OR PLEDGES.

Tod's previous knowledge of Garretson and reason to believe in his right to pledge.

J. Kennedy Tod & Co. had first met Garretson in the fall of 1890, when he came to them with a letter of introduction from Mr. J. J. Hill, President of the Great Northern Railway (pp. 469–475).

Garretson had become known to Mr. Hill when he and his associates had commenced the construction of the Sioux City and Northern Railroad; they had solicited from him the assistance of the Great Northern Railway in building that road, and Mr. Hill, while refusing to advance any money in aid of its construction, had caused a traffic contract to be executed between the Sioux City and Northern and the St. Paul, Minneapolis and Manitoba Railroad, to continue for thirty years, which gave to the former company the benefit of an interchange of business with the latter on the most advantageous terms, the former company thereby securing a haul over their entire line of railway (pp. 1150, 1143; pp. 692-3; p. 1699).

Mr. Hill, in his affidavit (pp. 1142-1150), offered in evidence by petitioner's counsel (p 692), says: "I "think that very largely upon the strength of this "traffic contract they were enabled to sell the first "mortgage bonds issued upon the road which they "did sell to Messrs. J. Kennedy Tod & Co., of New "York" (p. 1143). Hedges testified that he and Garretson went to New York in December, 1890, and there Garretson told Mr. Hill that "*he* was very "much in need of money and wanted to sell the "Sioux City and Northern bonds;" that Mr. Hill introduced them to Mr. Northcote, a member of the firm of J. Kennedy Tod & Co., who in turn introduced them to his partners, and after some negotiations that firm finally bought the bonds (pp. 1700-1702).

The next transaction Messrs. Tod & Co. had with Garretson was on July 31, 1891, when they loaned him $76,000 on his note secured by $200,000 Nebraska and Western bonds as collateral (p. 471). J. Kennedy Tod testified that at that time he believed that Garretson's note was good for $75,000 without the bonds.

"Q. * * * What reason, if any, had you to make the loan of seventy-five thousand dollars on

two hundred bonds of the Nebraska and Western Railroad?

"A. He had been introduced to me some time previously as a responsible and reliable man, and I had purchased about two million dollars of securities from him, and I believed that in making a comparatively small loan of seventy-five thousand dollars he was perfectly good for it, and that securing it as he did with two hundred thousand dollars of bonds made the loan still better" (p. 1319).

Before his next transaction with him—the million dollar loan—J. Kennedy Tod went to Sioux City and there met Garretson and his associates, and spent a day going over the property. At the time of the million dollar loan contract, Garretson had told him that there was no floating indebtedness on the Terminal property, and he continued his representation afterwards, during the construction of the Terminal. Mr. Tod knew of the *first* mortgage on the Terminal. He saw the Union Station, which was being erected on the Terminal property at Sioux City, while it was in process of construction. It was then fairly started; the foundations were laid. That was in the spring of 1891 (pp. 491-2). Mr. Tod knew that Garretson had associates. He originally came representing himself and his associates. He brought and introduced to him Mr. Hedges as one of his associates. At other times Mr. Tod had interviews with him and his other associates (p. 1334).

When Mr. Tod visited Sioux City, which was in the spring or early summer of 1891, he was introduced to a large crowd of gentlemen as the leading merchants and bankers of Sioux City, and to some of them as associates of Mr. Garretson in railway enterprises. Mr. Haakinson or Henshaw was one; Mr. Hornick another. Mr. Tod was accompanied on this occasion by a Dutch banker and a Scotch banker, who, with his firm, had purchased a part of the Sioux City and Northern bonds. They were introduced to a large group of gentlemen in Mr. Garretson's

car as the owners and purchasers of these securities. Mr. Hedges was present at all the important negotiations between J. Kennedy Tod & Co. and Garretson. At the time of his visit to Sioux City, many of the gentlemen, who were his fellow-passengers in Mr. Garretson's private car that day, spoke in very loud praise of Mr. Garretson as a business man, an honest man and a wealthy man (pp. 492, 1335, 1341). That Mr. Garretson was then a banker in Sioux City, president of a bank, as he remembered. That up to the transaction of December, 1892, he had learned nothing concerning him but good reports (p. 493).

Wm. S. Tod testified:

" We believed that Mr. Garretson was a man of very great wealth; that he owned the O'Neil and Western bonds; that he owned the Sioux City and Northern stock—it was in the main part registered in his name—the bonds were 'bearer bonds;' we believed that he owned those collaterals; that he had been borrowing money upon them in other places, and that he had the right to pledge them. * * * Mr. Garretson had brought letters of introduction to us; we had met Mr. Garretson on many occasions; had seen people who knew him, and in that way we considered ourselves well informed as to his affairs " (p. 426).

Of course he knew he had associates; Garretson always referred to them as his associates, from the beginning of his dealings with them, and they had from time to time certificates of stock in the names of the various associates, with transfers thereof signed by them (pp. 1334-5).

At the time of making the $1,500,000 loan and for a considerable time prior thereto, a large part of the collaterals described in the contract had been in the possession of Tod & Co. as collateral to other loans. They received as collateral under the $1,500,000 loan the same collateral as that held under the outstanding loan made by them to Garretson in October,

1891, except that they received in addition, one-half of the Sioux City and Northern stock, and gave up the one-half of all the Sioux City, O'Neill and Western stock which they had held (p. 444).

All of the certificates of Sioux City and Northern stock which were pledged under that loan had transfers in blank endorsed thereon, signed by the parties in whose names the certificates respectively stood (pp. 1341-2).

Garretson's position in Sioux City was that of a local magnate. He was cashier of the Sioux National Bank until 1890, then vice-president of the Union Loan and Trust Co. and of the London and Sioux City Finance Co; treasurer and afterwards president of the Sioux City and Northern Railway Co., president of the Sioux City Terminal and Warehouse Co. and of the Sioux City, O'Neill and Western Railway Co.; a director in the Sioux City Life Indemnity Co. and the Union Stock Yards Co. (pp. 688-91; 756-7). As already shown, he was one of the syndicate of five men who built the Sioux City and Northern railroad, bought control of the Pacific Short Line, and were promoting the construction of the bridge and other enterprises. It was "boom" times in the West, and capital was easily induced to flow freely in that direction. The holders of Union Loan and Trust Co. notes lent their money readily without inquiry, and without security. Tod & Co. were cautious, and lent theirs on apparently good collateral.

J. Kennedy Tod testified that—

> He did not at or before the time of closing the $1,500,000 loan have any knowledge or any information or any intimation from any source, that any parties other than the Pacific Short Line Bridge Company, A. S. Garretson, D. T. Hedges, John Hornick and Ed. Haakinson, had any interest in or claim to these securities pledged for that loan. He had never heard or had any statements made from any person, of any

claim to those securities on behalf of the Union Loan and Trust Company, of Sioux City, and he had no reason at that time to suppose that any persons other than the parties with whom he was dealing, had any interest whatever in those securities (p. 1318), except that, as he testified when examined on behalf of Intervenor, and again on his own behalf, the Manhattan Trust Company had served his firm with a notice in the form of a letter to Mr. Garretson produced at petitioner's request (Ex 1, p. 666), and which was to the effect that they had an interest in those securities, or the proceeds thereof, after the loan was paid off, mention of which was made by witness at the time of the interview between Messrs. Coombs, Plumer and others in September (to be hereafter referred to). That aside from that claim there was never any person he heard of as claiming those securities until Mr. Coombs appeared (p. 1351).

W. S. Tod testified that he had never heard of any claim to a right or interest in or lien upon any of the securities pledged as aforesaid, until about July or August, 1893, *after the default in the interest had taken place*. Prior to that time he believed the securities belonged to Mr. Garretson and sometimes that some of his associates had an interest, that belief being grounded upon statements made to him by Mr. Garretson.

All the evidence in the cause shows that J. Kennedy Tod & Co. had every reason to suppose that Garretson was a man of large affairs, possessed of ample securities which he had every right to deal with; and all the evidence shows that everybody who now claims to have any interest in that collateral, suffered Garretson to deal with it as he saw fit, either with full knowledge of what he was doing, or with the means of knowledge—permitted him to take the securities and sell or pledge them in furtherance of syndicate enterprises and without a word or thought of question until after the failure of those enterprises.

(2.) History of Manhattan Trust Company's transactions in Nebraska and Western bonds and dealings with Garretson, knowledge of which appellant seeks to impute to appellees through supposed information obtained by counsel, and which is relied on to defeat appellee's claim to be *bona fide* holder for value without notice of securities in controversy.

History of Manhattan Trust Co. dealings with Garretson.

For the purpose of creating material with which to charge the defendants with some defect in title, and upon the theory, apparently, that if they could cast a malign aspect upon the transactions between Garretson and any of the parties with whom he had dealt in New York, the Court would not closely scrutinize the character or sufficiency of the petitioner's evidence, but would grant him some relief (in which tactics they were, in a measure, successful in the Circuit Court); the petitioner's counsel, with the aid of Garretson and his associates, entered upon an elaborate examination into the history of the Wyoming Pacific Improvement Co., the Nebraska & Western Railway, and Garretson's transactions with the Manhattan Trust Company in order to establish (*a*) that the trust company had been guilty of various frauds, culminating in the sale to Garretson of Improvement Co. notes, secured by Nebraska & Western bonds, under false representations; (*b*) that knowledge of these facts must have come home to Tod & Co., because one of the members of that firm was a director in the Trust Co., and because one of their counsel was also counsel for the Manhattan Trust Co

An enormous mass of testimony and documents have been introduced into the case to sustain these theories, and the appellant's brief is mainly composed of strenuous efforts to make a plausible theory of fraud by inference from the evidence on these points.

When neither the rules of evidence nor the elementary rules of law, govern the framing of pleadings or the introduction of evidence; and briefs are printed for submission to the Court, in which elaborate and misleading statements as to the evidence are relied upon to sustain the conclusions adduced, it is difficult to reply categorically without trespassing too greatly upon the patience of the Court, but a brief summary of the evidence on what may be considered the salient points of attack will be attempted.

1. Manhattan Trust Company's connection with Wyoming Pacific Improvement Company matters:

Manhattan Trust Co.'s connection with Wyoming Pacific matters.

As stated above, Manhattan Trust Company was trustee under the mortgage of the Nebraska and Western Railway Co., and a lender to the Wyoming Pacific Improvement Co., which was engaged in the construction of the railroad, and Mr. Waterbury, the vice-president of the Trust Company, was partly instrumental in selling to Garretson the notes of the Improvement Company, secured by bonds of the Railroad Company.

The fact was elicited by the intervenor's counsel that the Nebraska and Western bonds which were first engraved were destroyed, and a new issue prepared and certified, and this circumstance is made to do service in their brief for ample proof of frauds and perjuries of all kinds necessary to sustain their prayer for relief.

Read in the light of the other evidence, however, the circumstance is free from any invidious significance.

The first issue of bonds was received and certified as above stated and held by the Manhattan Trust Company for the various loans referred to. Some time in the autumn the New York Stock Exchange made a regulation requiring all bonds to be listed with it, to have a border printed in a color different from that of the body of the bond, and because of

this regulation, as well as that in the original bonds the name of one of the counties through which the road ran was misspelled, a new series of bonds was ordered to be engraved (pp. 1430-31).

The new issues were received from the engravers as follows:

400	on	October	27, 1890.
400	"	"	28, "
400	"	"	29, "
400	"	"	30, "
400	"	"	31, "
400	"	November	1, "
725	"	"	3, "
3,125			

(P. 1443.)

Mr. Waterbury testified that such new bonds were delivered to the Trust Company, or rather to the Railroad Company, and by it to the Trust Company, and countersigned by the Trust Company, *and coincident with such delivery and execution, the original bonds were canceled.* That the new bonds were executed and the original bonds of the like number canceled as nearly as possibly simultaneously (p. 1431). At the same time the Trustee signed a new bond, they cut out the signature on the old bond and canceled each coupon by punching it (p. 1430-1).

There were also produced and offered in evidence a number of affidavits made at the time by officers of the Railroad Company and by A. T. French on behalf of the Trust Company, showing that the bonds of the first issue were burned in their presence as follows:

400	on Oct.	28, 1890,	Nos.	1 to	400;
400	" "	29, 1890,	"	401 "	800;
400	" "	31, 1890,	"	801 "	1,000;
1,500	" Nov.	13, 1890,	"	1,001 "	2,500;
625	" "	17, 1890,	"	2,501 "	3,125, *unexecuted*,

for the reason as certified in the affidavits that "they did not conform to the requirements of the New York Stock Exchange in not having an engraved border on the face of the bonds" (pp. 1434-5).

Twenty-five hundred and eighty-three of the new bonds were certified by the trustee, and in reply to a question by Mr. Coombs, whether in case any of the officers of the company had made an overissue and he did not have it on the bond register book, he would know anything about it, A. T. French replied that the Trust Company still had bonds numbered from 2,584 to 3,000 *uncertified* in their possession (p. 1290), and he produced before the examiner, bonds of the Nebraska & Western Railway numbered consecutively from 2,584 to 3,125, both inclusive, all having coupon No. 1 cut off and all the other coupons annexed. Nos. 2,584 to 2,600 were all signed on behalf of the Nebraska & Western Railroad Company by D. MacKenzie, Vice-President, and T. W. Tomlinson, Secretary, and sealed, *but were not certified by the Trust Company*, and the remainder of the bonds were not signed by the Railway Company; all of said bonds were in the same form as the bonds set forth in the mortgage of the Nebraska & Western Railroad (p. 1436).

The argument made by the appellants in the foregoing facts (Brief on Facts, p. 105, pp. 110, 116), is most extraordinary. They start with the assumption that the agreement securing the $1,000,000 loan to the Wyoming Pacific Improvement Company (Defts'. Ex. 1, p. 1462, *ubi supra*), "*made the Manhattan Trust Company morally a guarantor of the loan agreement!*" (p. 110). Upon a parity of reasoning, every Trust Company which becomes a trustee under a railroad mortgage also becomes morally a guarantor of its bonds. Then they argue that the note of June 30, 1890, wherein the Improvement Company pledged 450 bonds, numbers 2,101 to 2,550 as collateral security for its repayment "*was both a renypotheca-*" *tion* and a fictitious representation, at least in this

"sense; that at that time, this amount of bonds had "not been earned or executed" (p. 112). The general clause at the end of Article Sixth of the Agreement (p. 1465), to which counsel refers, must be read in connection with the preceding clause, which, while transferring to the Manhattan Trust Company as collateral security for all advances made under the agreement "all bonds earned, or that may at any time be earned," limits its operation by the following clause: "*Until the Trust Company, as trustee, is fully secured by two thousand dollars of bonds at par for each one thousand dollars of principal of advance*" (p. 1463). Having made $1,050,000 of advances and received $2,100,000 of bonds as security, it is perfectly obvious *that any of the remaining bonds earned were free of the pledge*, and the suggestion that the further bonds were affected by the $1,050,000 loan is highly disingenuous. Nor is the charge of fictitious representation of greater weight. The simple fact is that the Manhattan Trust Company, which made the loan, chose to do so upon bonds not yet actually issued, but which had been actually earned by construction, the engineer's certificates for which were within a few days afterwards delivered to it (p. 1277; Sup. to printed Record, p. 8), and which bonds were shortly after the date of the note certified and delivered to it (p. 1224). If it chose to advance the money before the actual execution and delivery of the bonds, it had a right to do so, and no one could be deceived thereby.

Ignoring the testimony of Mr. Waterbury, who clearly explained that the entire collateral for the seven notes, aggregating $490,000, less $20,000 paid October 29, 1890, leaving $470,000, was that recited in the note of June 30th (p. 1479), viz., 450 Nebraska & Western bonds, 26,000 shares of Nebraska & Western stock and $50,000 town bonds of O'Neill, Nebraska; the collateral mentioned in the subsequent notes being the same as expressly recited in that of October 1st (p. 1481), but which was unnecessary,

as all the notes and the collateral were held together by the Manhattan Trust Company (p. 1420), and was therefore omitted from the other notes; that nobody could have been deceived by the failure to state that the collateral was also covered by the previous loans, as both the pledgor and they who held the notes knew the fact; *that the same thing was done later on in another case about which there can be no question, when Garretson made his two notes dated February 14, 1891, to the Trust Company for $100,000 and $90,000 respectively, each purporting to pledge $170,000 Sioux City and Northern bonds, there being but one lot of $170,000 actually pledged to secure both notes* (pp. 772-4); the appellants next assert that by the loan agreement as supplemented by that of March 22, 1890 (p. 1466), "all town and "county bonds were optional security to the $1,050,- "000 loan until railroad bonds by twice that amount "should be in the hands of the Trust Company, "*notwithstanding which facts $50,000 of Town of "O'Neill bonds had been pledged as security to the "note of June 30*" (p. 114).

Twenty-one hundred bonds had been issued prior to June 30th, as shown above (p. 1224), *and the O'Neill bonds were therefore free from the terms of the supplemental agreement.* The mistake in numbers of bonds specified in the note, Exhibit No. 25 (p. 1484), is *obvious;* and if any fraud had been intended it is scarcely conceivable that it would have been so stupidly committed as by specifying the numbers of bonds so plainly covered by the previous loan agreement.

The counsel also to round out his argument gravely adds that besides these bonds there were "$300,000 which in good faith were required to re- "spond to the original subscriptions for the road" (p. 114). The only *other subscriptions*, to which they can mean to refer, were those above referred to, in which the syndicate were subscribers.

But it was shown that no Nebraska & Western bonds were ever deposited with the Trust Company

to satisfy the requirements of the Certificates of subscription (Ex. 3, B. 393, *supra*) issued by the Wyoming Pacific Improvement Company (pp. 1437–8); that in February, 1890, the funds raised on the aforesaid subscription plan were exhausted, and no railroad had been completed. About twenty miles of the Nebraska & Western road was graded, but no bonds were earned or issued, and the company had, therefore, before it the problem of whether to let the enterprise drop there, or to endeavor to carry it through (p. 1231); efforts had been made to obtain other funds on the subscription plan in every direction, with no success at all. Then they resorted to the plan of negotiating a loan of $1,000,000 on a direct pledge of the bonds as earned (p. 1198).

This was consented to by the only subscribers who were before the Court in this case—viz., Garretson and the other members of the syndicate (pp. 817–18).

Garretson's negotiation with Waterbury and Goodwin.

The appellants then refer to the fact that on October 27th the new issue of bonds began to come in, on October 29th the burning of the old bonds was commenced, and on that day Waterbury telegraphed to Garretson to come to New York (Brief of Facts, p. 116).

But an issue of bonds cannot be engraved in a day. *Everybody knows that their preparation is a matter of weeks.* As a matter of fact, six weeks is the usual time required from the giving of the order to the delivery of the bonds; so that in this case the order for the new bonds must have been placed not later than August 15th, a time when Mr. F. O. French was in Europe negotiating for their sale; before the financial depression which came in November, 1890, with the failure of the house of Barings, and when all the prospects for the success of the enterprise were so good that the Manhattan Trust Co. and its customers did not hesitate to advance $470,000 on $483,000 Nebraska and

Western bonds, 2,600 shares of Nebraska and Western stock and $50,000 Town of O'Neill bonds in order to ensure the completion of the road to O'Neill.

Garretson and Hedges, as has been seen, were subscribers to the $1,050,000 loan in $125,000 each, together, $250,000, to secure which, under the agreement, they were entitled to 500 Nebraska and Western bonds. These were a part of the $2,100,000 of bonds deposited with Manhattan Trust Co. as security for the entire loan in the proportion of two bonds of $1,000 each for every $1,000 loaned.

In October, 1890, the Improvement Company negotiated with Garretson a further advance of $50,000 on the same bonds. On October 22d, Wendell Goodwin, President of the Improvement Company, wrote to F. O. French, President of the Manhattan Trust Co.: "Having completed arrangements "with A. S. Garretson, of Sioux City, Iowa, for a "loan of 65 per cent. on $500,000 of the bonds of the "Nebraska and Western Railway Company for six "months at 8 per cent. interest, I hereby request that "you will forward to the Union Loan and Trust Com- "pany of Sioux City, Iowa, a receipt setting forth "that the Manhattan Trust Co. holds *for account "of A. S. Garretson, subject to his order, as col- "lateral to said loan*, five hundred bonds of the Ne- "braska and Western Railway Co., numbered from "2,051 to 2,550 inclusive, and I hereby certify that "the said bonds are the property of the Wyoming "Pacific Improvement Company, and are subject "to no other lien than the within mentioned" (Ex. 170, p. 1561).

On the same day, in obedience to that request, F. O. French, President, wrote to the Union Loan and Trust Co. of Sioux City: "In accordance with a "letter of Wendell Goodwin, Esq., of the 22d Octo- "ber, as per copy herewith, we hereby certify that "we hold for account of A. S. Garretson and sub- "ject to his order, as collateral to the loan therein "described, 500 Nebraska and Western Railway

"Company bonds of $1,000 each, Nos. 2,051 to 2,550, "inclusive" (Ex. 171, p. 1425).

Mr. Waterbury testified:

"Q. Do you know whether this loan of 65 per cent on 500 of the bonds bore any relation to the loan of $250,000 upon those 500 bonds made under the $1,000,000 loan agreement?

A. It was an increase above the 250; an increase of $75,000" (p. 1426).

The Trust Company had at the date of that letter the entire $2,500,000 of the first engraved lot of bonds that were issued, which had been executed and certified, and the certificates of the president and engineer of the Nebraska and Western Railway authorizing the issue of $83,000 more; all of which bonds were held as collateral for the various loans which had been made, the note of June 30, 1890, for $110,000 to the order of Manhattan Trust Co. alone, specifying the serial numbers of the bonds, viz., Nos. 2,101 to 2,550 (p. 1477).

Mr. Goodwin's letter requested the Trust Company to certify that it would hold, for Garretson's security, 500 bonds, bearing the serial numbers from 2051 to 2550, and, therefore, including those which were specifically mentioned in the note of June 30th. To do so would substitute those bonds for Garretson and Hedges' share of the first 2,100 which had been earned and issued with the proceeds of the $1,050,000 loan. Instead, therefore, of sending back the letter to have the serial numbers changed, the Trust Company merely substituted, as collateral to its own notes, 450 bonds of earlier serial numbers for those numbered 2101 to 2550, and held and certified those of the latter numbers as collateral for Garretson's loans (p. 1425).

On October 25, 1890, Garretson wrote to Wendell Goodwin, the president of the Wyoming Pacific Improvement Co.:

"I have perfected a loan for the Wyoming Pacific Improvement Co. of *$50,000 additional* on the 500 bonds of $1,000 each of the Nebraska and Western Railway Co. held by the Manhattan Trust Co. as security for advances which I have made that company, aggregating 65 per cent. of the bonds of $325,000 in all as follows:

$250,000 previously advanced on notes of the W. P. Imp. Co. as follows:"

[Then follows a list of the notes given upon the loan by Garretson and Hedges of their share of the subscription of $250,000 under the loan agreement of February 1, 1890 (Defendant's Exhibit 1, p. 1462; Defendant's Exhibit 3 and 4, pp. 1468-9; pp. 1468, 460, 446-7).]

"I have taken up the notes," he continues, "and now hold same a part of the advance of $325,000 of the Wyoming Pacific Imp. Co., $25,000 which was owned by the Union Loan and Trust Co. and endorsed by you dated June 8, 1890, *which with the $50,000 note executed by the Wyoming Pacific Imp. to-day*, aggregates $325,000, or 65 per cent. on the bonds, receipt for which came to hand to-day from Mr. French" (p. 1748).

While correspondence and testimony alike show that all parties distinctly made and understood these transactions to be precisely as above stated, appellant's counsel argue that the Manhattan Trust Company *must have understood* Goodwin's letter to mean that he had negotiated a separate independent loan of $325,000, *in addition to* the prior loan of $250,000; that "*Garretson's construction of the loan he had made*, as disclosed by his letter of October 25, *must have surprised them*. That while the president of the Trust Company might have been wicked enough to surrender for $350,000 fresh money, "the only security which his own Trust Company had for $400,000," he would not have been foolish enough to do it for $13,000. That, therefore, they

at once telegraphed to Garretson to come to New York, and induced him by false representations to make further advances (Brief on Facts, pp. 120-122). This is most ingenious, but as the facts are to say the least equally consistent with the direct testimony of Mr. Waterbury and an entirely innocent explanation, the Court will hardly adopt the lively imaginings of appellant's counsel as a substitute for proof of fraud.

GARRETSON, having testified on behalf of the petitioner that he had caused $750,000 Sioux City and Northern bonds to be sent to the Manhattan Trust Co. in New York about November 1, 1890, was further interrogated by Mr. Coombes as follows:

"Q. Now, Mr. Garretson, I am going to ask you what the condition or relation of the Union Loan and Trust Company was to any of the securities of the Wyoming Pacific Improvement Company at that time, and what negotiations you had in New York because of that in which these bonds were used; a general question?

Objected to as incompetent, immaterial and irrelevant.

A. Our people, that is, the railroad people, had loaned some $400,000 to the Wyoming Pacific Improvement Company on $500,000 of bonds of the Nebraska and Western Railway Co., and were therefore very deeply interested in the outcome of the undertaking on the other side of the river--what was the question please? Q. I couple the Wyoming Pacific in the 750,000 of bonds; I don't want to lead you into anything? A. I was called to New York by Mr. Goodwin and Waterbury the last day of October, 1890, and they met me at the Fifth Avenue Hotel and we were talking over their matters in Nebraska——

Defendant's counsel objects to any conversations between Mr. Goodwin and Mr. Waterbury on the one side, and Mr. Garretson on the other,

or anybody on the other, as transactions between parties other than the defendants (p. 702).

Garretson's allegations of misrepresentation.

A. (Continuing.) And they stated that they had a loan of $500,000 which was matured and which had been called, *and that it was distressing them a good deal*, and there was danger of the entire undertaking being put to hazard if it was not taken care of, and that *the company was unable to take care* of the loan.

Q. Mr. Daniels: What company; specify it? A. The makers of the notes. * * * A general conversation was had during the evening until a late hour of the condition of the Wyoming Pacific Improvement Company * * * and the construction of the Nebraska and Western road by that company. Don't that answer the question?

Q. My question went further than that, and comprehended a statement of what was done.

Defendant objects to any conversation between Mr. Goodwin and Mr. Waterbury on the one side, and Mr. Garretson on the other, or anybody on the other side, as transactions between parties other than the defendants.

A. I received a statement of the condition of the Wyoming Pacific Improvement Company, as touching the condition of the construction of the road in Nebraska the following day.

Q. From whom?

Same objection as last above.

A. From Wendell Goodwin, Mr. Waterbury and Mr. French. I had frequent conversations during the succeeding day with reference to the property, which later on resulted in my taking up the loan which had matured *and which was distressing them*, by making a new loan and putting up new securities, to wit, $750,000 of bonds of the Sioux City and Northern Railroad Company.

Q. *Do you know who held the loan of* $500,000 *that was distressing them?*

Objected to as incompetent, immaterial and irrelevant.

A. *The loan was at the office of Augu Belmont & Co.* (pp. 702–3).

Q. Were you informed at this time you gave the $500,000 in notes by Mr. Waterbury and Mr. French and Mr. Goodwin, or either of them, of the financial condition of the Wyoming Pacific Improvement Company?

Objected to as incompetent, irrelevant and calling for hearsay evidence.

A. Yes, sir; they gave me a statement of the general condition of the company.

Q. Whether or not there were any other notes out like those that were down at Belmont's?

Objected to as incompetent, immaterial and irrelevant and calling for hearsay evidence.

A. Yes (p. 704).

Q. Have you any recollection as to whether those notes which you took up, including those that were at Belmont's, *had the endorsement of the Manhattan Trust Company on them or not?*

Objected to as incompetent, immaterial and irrelevant.

A. *Yes, sir; they had.* The Manhattan Trust Company endorsed the notes; I am sure of that" (705).

The witness then testified that the statement of the indebtedness made to him by Mr. Waterbury or Mr. French at the time he gave his notes for $500,000, was false to the extent of nearly $300,000, as was proven when they got at the books and found out what the company did. That statement was given to him by them in Mr. Goodwin's presence and that the indebtedness of the company was so much, which he put down. That statement was given orally and put down by him immediately as they gave it to him. Later on they gave him a

written statement, which he had, but it made a different showing from the statement rendered at the time that the assistance was given them (p. 706).

Q. Why did you keep on loaning more money?

Objected to as incompetent, immaterial and irrelevant.

A. Our first thought was to bring an action, but later on we thought best to secure the loans and go ahead with the property and do the best we could with it, they making some further concessions and agreeing to furnish money and carry the thing along until the bonds would be sold, or for twelve months.

Q. At the time you loaned the $500,000 had you fully resolved to acquire the Nebraska and Western property, or was it tentatively or temporarily?

Objected to as incompetent, immaterial and irrelevant, as the resolutions of the witness are not competent evidence in the case.

A. Before leaving New York, with the statements they had made and all, and the agreements which they made in reference to the finances, &c., I had resolved for our syndicate that we would take the property, inasmuch as it had been a valuable connection with the Sioux City and Northern road, *taking from it a vast amount of business and giving to it a vast amount of business.*

Witness further stated that he was first introduced to J. Kennedy Tod & Co. or any member of that firm in February, 1890; that Mr. Hedges and himself were introduced to Mr. Northcote of that firm in February, 1890, and at the same visit to New York they became acquainted with the other members of the firm or with Mr. J. Kennedy Ted and William S. Tod; that the introduction to Mr. Northcote was in the office of James J. Hill.

Q. Was anything said as to the transaction with

the Manhattan Trust Company that I have been inquiring of at that introduction?

Objected to as immaterial, irrelevant and incompetent.

A. Yes, sir.

Q. State what it was?

Same objection.

A. We stated to both James J. Hill and J. Kennedy Tod & Co. the situation of the Manhattan Trust Company.

Defendant's counsel moves to strike out the conclusion of the witness and asks him to state the facts.

A. With reference to our properties and to the misrepresentations by Waterbury as to the cost of the property in November.

Defendant's counsel moves to strike out the answer of the witness as a conclusion, and requests witness to state the facts and not general conclusions, and further objection that the answer is not responsive.

Q. I will ask you whether or not your plans and purposes with relation to the Nebraska and Western property were discussed at that meeting?

Objected to as immaterial, irrelevant and incompetent.

A. THE DISCUSSION OF THE PLANS AND PURPOSE OF THE NEBRASKA PROPERTY AT THAT TIME WAS TO THE EFFECT THAT IT WOULD BE NECESSARY TO COMPLETE THE BRIDGE AND TO EXTEND THE ROAD TO A CONNECTION WITH THE BURLINGTON ROAD IN NEBRASKA IN ORDER TO MAKE THE SIOUX CITY AND NORTHERN AND THE NEBRASKA ROAD AND BRIDGE AND TERMINAL PROPERTY A COMPLETED PROPERTY.

Defendant's counsel moves to strike out the answer as not responsive to the question and as not a statement of facts" (p. 715).

BOTH MR. WATERBURY AND MR. GOODWIN FLATLY DENIED THESE CHARGES OF GARRETSON. MR. FRENCH WAS DEAD WHEN THIS SUIT WAS BROUGHT. GARRETSON'S TESTIMONY IS ENTIRELY UNCORROBORATED.

As already shown, Garretson had expressed a great desire to get control of the Nebraska and Western enterprise, and in the latter part of August had made a written offer to take the whole undertaking and pay back to the parties the amount of money they had put into it with six per cent. interest (Ex. 166, p. 1559), and he and Waterbury had had several conversations on the subject subsequently (p. 1420).

As soon therefore as it was learned that August Belmont & Co. had decided not to renew their $500,000 loan maturing November 1st., Waterbury telegraphed the fact to Garretson, who immediately replied that he would be at the Fifth Avenue Hotel in New York on Friday evening, and asked Waterbury to advise Mr. Goodwin (p. 1560).

Interview Garretson, Waterbury & Goodwin.

WATERBURY'S account of the interview is that he told Garretson that, in pursuance of his request he advised him that Belmont would not renew, and that that, of course, would oblige many of the lenders to take the same position; and Garretson said: "Very well, if that is the case, I am prepared to take up all loans. I have sold my Sioux City & Northern bonds and I expect the proceeds within the coming week, and if you will loan me the money to take the Belmont notes I will give you $750,000 of Sioux City & Northern as collateral for the loan of $500,000."

That Waterbury stated to him that he would make such a loan based on his statement that the bonds had been sold in Boston, and that he would confirm such loan after consultation with the Executive Committee on the following day (pp. 1422-3). That Garretson discussed the position of the Wyoming Pacific Improvement Company with Mr.

Goodwin, who made up a statement of the liabilities as shown by the books of the company in New York, and stated that so far as the liabilities in Sioux City were concerned he had no knowledge (p. 1423). Waterbury made no statement of what the liabilities of that company were, because he had no knowledge of what they were outside of the million-dollar loan, and what was due the Trust Company, the British-American T. & F. Co. and Transfer Association.

GOODWIN testified that the interview was the result of a communication, or rather a statement that Mr. Garretson had made some time previously, that he would be prepared to take up personally the interest in the Wyoming Pacific Improvement Company if the people here were willing to sell out, and that he (Goodwin) had told Mr. Waterbury that the times were such, and the finances of the corporation were such, that it was most advisable for them to be relieved in some way, and asked him, in view of what had been stated by Mr. Garretson, if he would not ask him to come here. Prior to that time Goodwin had made every effort on behalf of the Improvement Co. to get an extension of the loans which were matured November first, without success. Belmont had refused to extend. That in the conversation with Garretson he, Goodwin, stated that there were about $1,700,000 of liabilities of the corporation in New York, and there were certain obligations which showed on the books of the corporation in Sioux City where they were kept, and these he could not give him in detail, but he could get them all there. That it was not true that either he or Mr. Waterbury gave Mr. Garretson a statament of the obligations of the company at that time, except the general one he had spoken of. Neither he nor Mr. Waterbury gave Mr. Garretson a statement of the liabilities, which was about $300,000 short of the actual amount of the obligations and liabilities, or a statement that was untrue (1192-3).

That at the interview aforesaid, Garretson said that one of the means he would use to carry through the purchase of the Improvement Company notes, would be from the proceeds of his Sioux City & Northern bonds, which were sold to a brokerage and banking house in Boston, which he named at the time, but whose name Goodwin did not recall (p. 1197). That Garretson was apparently anxious to conclude the bargain, from the fact that that meeting that evening was of only three or four hours' duration and almost settled the situation. That neither he nor Mr. Waterbury had made any statement to Mr. Garretson to induce him to enter upon this arrangement at all against his will, and that there was no reluctance upon his part to do so (*Id.*).

That the liabilities of the corporation, and its situation in a general way were gone over. The amount of the bonded indebtedness and the amount of stock were discussed. Garretson knew and understood that the road had pledged its bonds at fifty cents on the dollar, as he held some of them himself, and Goodwin presumed that he understood the terms of the construction company's contract, *as he was a director of the corporation.* He assumed that he understood the whole disposition of the securities, *inasmuch as he had been consulted upon every step taken previously to that time* (p. 1213). That they went over with him the indebtedness of the road more or less. He (Goodwin) stated the thing exactly as it was represented on the books here and as far as the obligations that were then covered by the New York end and the loans. He stated to him the obligations exactly as they were, but reserved the right and so stated to him, as to what obligations there were in Sioux City, they would appear on the books there. That some of the books were kept in Sioux City, the construction account. He could not say that there would likely be any large discrepancy in the indebtedness of the company, because he did not know how the books were in

Sioux City. *That Mr. Garretson had kept himself familiar with the progress of the work from the first, and was very active, and kept himself informed on what was going on in Sioux City. He also kept himself in touch with all matters here, and practically knew as much as they did in New York* (pp. 1214–15).

The parties then exchanged letters dated Nov. 1, 1890.

That addressed by Messrs. French and Waterbury to Garretson ran as follows:

"In reference to the loans of the Wyoming Pa-
" cific Improvement Co. not matured in New York,
" viz., $200,000 maturing December 8, 1890, and cer-
" tain loans due the Manhattan Trust Company,
" we agree with you that the loans in the Manhat-
" tan Trust Company shall be renewed by the par-
" ties holding them, or the loans shall be placed
" elsewhere, the renewal notes to be made by the
" Wyoming Pacific Improvement Company or by
" you. If necessary this arrangement to cover one
" year from date. In carrying out any of these re-
" newals we shall be authorized to use all the bonds
" and stock of the Nebraska and Western R. R.
" Co., there being in all $2,080,000 of bonds and
" about $2,600,000 stock" (Ex. 8, p. 950).

(The remaining $500,000 of bonds were those specifically pledged to secure Garretson and Hedges loans of $350,000, above referred to.)

The letter addressed by Garretson to French was as follows:

"I hand you an order on F. V. Parker & Co., of
" Boston, Mass., to deliver to you the avails of the
" first bonds of the Sioux City & Northern Railroad
" Company sold, to the extent of 750 bonds, the
" same to be first applied to take up the notes ag-
" gregating $500,000, dated November 1, 1890.
" Your company to be entitled upon payment, how-
" ever, to hold the collateral attached to said notes,
" 750 others of the bonds" (Ex. 168, p. 1560).

The so called "Belmont" notes were produced in evidence *and are shown not to be endorsed by the Manhattan Trust Company* (p. 1481, Defts.' Exs. 6, 7, 8, 9 and 10, pp. 1472-3), despite Garretson's positive assertion to the contrary; and petitioner's counsel having alleged in the second amended petition and in their brief in the Circuit Court that the notes *were* so endorsed, in the Court of Appeals took refuge in the theory that the Manhattan Trust Company was *morally* responsible for their payment (Appellant's Brief on Facts, p. 110).

In view of this conflict of testimony some light may be thrown upon the probabilities of truth by a consideration of who the parties were, as well as by Garretson's subsequent conduct.

Manhattan Trust Co.

The MANHATTAN TRUST COMPANY had been in existence since May, 1888, under that name, and prior to that date and since 1871 as the Real Estate Trust Company. It has a capital of $1,000,000 and a surplus of about a quarter of a million dollars. In the year 1890 its directors were August Belmont, Jr., of August Belmont & Co.; R. T. Wilson, of R. T. Wilson & Co.; T. Jefferson Coolidge, Jr., President of the Old Colony Trust Company, of Boston, Mass.; Samuel R. Shipley, President of the Provident Life & Trust Company of Philadelphia; E. D. Randolph, President of the Continental National Bank of New York; H. W. Cannon, President of the Chase National Bank of New York, formerly Comptroller of the Currency; R. J. Cross, of Morton, Bliss & Company; A. S. Rosenbaum, Charles F. Tagg, John R. Ford, a director of the Home Insurance Company; James O. Sheldon and F. O. French, of New York, Henry L. Higginson, of Lee, Higginson & Co., Boston, Mass., and John I. Waterbury (pp. 1410-11).

The business of the company is to receive money on deposit, loan money on securities and to act as trustee for individuals and corporations in all capacities. It has a line of deposits ranging from five to six million dollars. It is the designated depositary for funds of the State of New York, of

the City of New York, and for all courts in the City and State of New York.

In 1890 F. O. French was its president and John I. Waterbury its vice-president. Mr. French had been previously president of the First National Bank of New York, and was the man who carried out the refunding of the United States four per cent. bonds for Secretary Sherman (p. 1410). He is now dead. Mr. Waterbury, besides being vice-president and a director in the Trust Company, is a director of the Louisville and Nashville Railroad Co. and the Old Colony Trust Co. of Boston (p. 1411).

GARRETSON'S TESTIMONY WHERE NOT CORROBORATED IS SHOWN TO BE WORTHLESS BY HIS OWN ADMISSIONS.

As shown by Mr. J. J. Hill, in the affidavit sworn to October 26, 1893, *offered in evidence by the petitioner*, the sale of the 3 600 shares of stock to him for $350,000 was induced by the false representations made by Garretson and his associates, that the Sioux City and Northern Railway and the Terminal Company were free from all indebtedness except the first mortgage on the railroad and the Terminal property (pp. 116–117), which charge is virtually admitted by the letter from Garretson to Mr. Hill, dated April 26, 1892, set forth in his affidavit (p. 119).

Garretson's Explanation of his misrepresentation to J. J. Hill.

The explanation which petitioner's counsel elicited from Mr Garretson about this matter is extraordinarily disingenuous (see pp. 793–4) He testified that at the time of the negotiations the first proposition which they submitted to Mr. Hill was for a sale of their equity in the securities pledged to secure the Bridge notes, and in that connection "*it was* "*represented to Mr. Hill that neither the Sioux* "*City & Northern nor the Terminal Company had* "*any debts* but what would be retired, other than "debts growing out of freight balances with con- "necting lines," that after Mr. Hill refused to buy the equity in the collaterals, Hedges offered to sell

him one quarter of the Sioux City and Northern stock, which offer was accepted, and that at that moment "it did not occur to Mr. Hedges "or myself until we had retired to our "hotel" * * * "then this matter occurred "to us, and we went back on the following day, "Sunday, to the hotel of Mr. Hill and called him "down stairs, and was talking matters over, *and* "*I stated to him that I wanted to qualify the state-* "*ment that I had made the day before with refer-* "*ence to the debts of the Terminal Company,—that* "*it had some debts; I used the exact words:* 'THAT "IT HAD SOME DEBTS,' *and the question was not* "*asked, how much?* and in fact the matter was "dropped by the conversation going into other "matters, *and that was all there was said about* "*debts of the Terminal Company at the time*" (p. 753)—a pretty excuse for concealing the existence of $750,000 of floating debt upon the Terminal property! This explanation must be read in connection with Garretson's statements in his letter of April 26th, 1892, to Mr. Hill, that "it became absolutely neces- "sary, in order to save an officer of the Trust Com- "pany from possible criminal action, to put a mort- "gage on the property of the Sioux City Terminal "Company, *covering the money which had been* "*used there in improvements there during the past* "*year;* this second mortgage is for $750,000 and "was filed yesterday;"—when as matter of fact the mortgage was given to cover an indebtedness which had been in existence for years, and steadily grow- ing, and it appears in evidence that a previous mort- gage which was never recorded had been given by the Terminal Company to the Union Loan & Trust Company November 24th, 1890, to secure payment of notes aggregating $260,000 (p. 935), and that the $750,000 mortgage was given to cover the amount of this prior mortgage, and the additional indebtedness of the Terminal Company (pp. 926-7).

Garretson's subsequent action also shows that the

whole story of false representation was gotten up afterwards, in order to justify him with his associates, the bargain not proving to be as good a one as he had expected.

Failure of Wyoming Pacific Improvement Co.

The Wyoming Pacific Improvement Co. failed in December, 1890, about Christmas time (p. 1299), and Wendell Goodwin was appointed Receiver of all its property outside of Nebraska and Wyoming.

Agreement Manhattan Trust Co. and Garretson, Jan. 28, 1891.

On January 28, 1891, an agreement was entered into between A. S. Garretson and the Manhattan Trust Co. "*for itself, and as trustee for or repre-*
"*senting the several other parties holding notes of*
"*the Wyoming Pacific Improvement Co., with*
"*bonds as collateral thereto*" (Defts.' Ex. 2, p. 1106), whereby Garretson agreed to purchase the notes and claims against the Improvement Co., shown on a schedule annexed to the agreement marked A, and which, after reciting that as by such purchase he would become the holder as collateral of large amounts of Nebraska & Western bonds, agreed that he should be assisted by all proper means in procuring a sale of the railroad under the existing foreclosure proceedings should he so desire, or a dismissal of the pending suit, and a vacation of the receivership, so as to place him in control of the railway and carry out his views in regard to the reorganization of the Railway Co., subject to all rights of redemption which might lawfully exist. It was also agreed that the Receivers of the Improvement Company should proceed to wind up its affairs and ascertain its debts, and that the Manhattan Trust Company should lend its good offices toward an adjustment thereof; and this agreement, it was provided, and the settlement made thereby, "*is in full adjust-*
"*ment and settlement of all questions theretofore*
"*arising between the two parties hereto, in refer-*
"*ence to the said Improvement Co., or the construc-*
"*tion of the Nebraska & Western Railway.*"

Schedule A was a list of the following notes:

Notes held by Manhattan Trust Co., $296,331.14, with interest from November 1, 1890; secured by 592 Nebraska & Western Railway bonds and 25,833 shares of its stock.

Notes held by British & Am. T. & F. Corp., $150,000, with interest from November 1, 1890; secured by 300 Nebraska & Western bonds.

Notes held by U. S. Transfer & Ex. Assn., $40,000, with interest from November 1, 1890; secured by 80 Nebraska & Western bonds.

Notes held by Wendell Goodwin, $24,500, secured by 49 Nebraska & Western bonds.

Belmont notes taken up, $500,000.

Collateral remaining, 367 bonds.

Renewal notes, aggregating $270,000 (those given to the underwriters), secured by 695 (should be 675) Nebraska & Western bonds.

Further Loans to Garretson by Manhattan Trust Co.

This contract was carried out by Garretson, and all the above notes were taken up by him.

To assist him in so doing, the Manhattan Trust Co. made various other loans to him, as follows:

On January 29, 1891, $300,726.72, payable on or before February 15, 1891, secured by 1,214 Nebraska & Western bonds, with which he took up the notes held by the Trust Company, aggregating $296,331.14, *supra*.

On January 29, 1891, $25,989.58, on $93,000 of Nebraska & Western bonds.

On February 14th, $190,000, on 170 Sioux City & Northern bonds, and the equity in the $750,000 of S. C. & Northern bonds, held against the $500,000 loan made November 1, 1890.

On February 13, 1891, $51,166.67, and the same day, $152,041.67.

On June 15, 1891, $23,000 on $93,000 Nebraska & Western bonds.

On July 31st, $50,000 on 2,000 shares of Sioux City & Northern stock.

The Manhattan Trust Co. also loaned Garretson

on July 31, 1891, $17,000, which was increased to $22,000 on $43,000 Nebraska & Western bonds, which was paid October 26th, and on October 26, 1891, it took $55,000 of Garretson's demand notes dated October 11, 1891, secured by the deposit of collateral with J. Kennedy Tod & Company, being a part of the million dollar loan (pp. 1431-1433).

The appellant's counsel say (Brief on Facts, p. 128):

"There were only two alternatives presented to "Garretson. One was to repudiate the trade and ac- "cept the foregoing consequences; the other was to "sell the whole issue of Sioux City and Northern "bonds, and with the proceeds stand by the ruinous "undertakings which had been imposed upon him "(P. R., 714). *Kennedy, Tod & Co. and Mr. Hill were "substantially advised of this latter dilemma*, and "under this pressure Tod & Co. bought the Sioux "City and Northern bonds at seventy-five cents on "the dollar (P. R., 1701), with the immediate conse- "quence that Strong & Cadwalader, counsel for Tod "& Co., and the Manhattan Trust Company, pre- "pared the agreement of condonation between the "Manhattan Trust Co. and Garretson." * * *

Analysis of evidence to charge Tod & Co. with knowledge of alleged frauds on Garretson by Manhattan Trust Co.

The reference to p. 714 is to GARRETSON'S examination by petitioner's counsel, as follows:

[Referring to the introduction of Hedges and himself to Kennedy, Tod & Co.]

"Q. Was anything said as to the transaction "with the Manhattan Trust Co. that I have been "inquiring of at that interview?

"Objected to as immaterial, irrelevant and "incompetent.

"A. Yes, sir.

"Q. State what it was.

"To which the same objection is made.

"A. We stated to both James J. Hill and J. Ken-
"nedy, Tod & Co. the situation of the Manhattan
"Trust Co.

"Mr. Wickersham: We move to strike out the
"conclusion of the witness and ask him to state the
"facts.

"A. With reference to our properties and to the
"misrepresentations by Waterbury as to the cost
"of the property in November.

"Mr. Wickersham: We move to strike out the
"answer of the witness as a conclusion and request
"the witness to state the facts and not gen-
"eral conclusions, and the answer also is not re-
"sponsive" (p. 715).

HEDGES' account of these same interviews—the reference to page 1701—absolutely fails to substantiate the statements cited from appellant's brief. He tells very fully what was talked about, but says not a word about the allegations of misrepresentations by Waterbury or Goodwin to Garretson.

J. KENNEDY TOD denied absolutely that he had any knowledge of the loan transactions between Manhattan Trust Co. and Wyoming Pacific Improvement Co. (p. 1320).

Wm. S. Tod testified that he never knew there were any agreements or arrangements between the Wyoming Pacific Improvement Co. and the Nebraska and Western Ry. Co., and he knew nothing about the relations between the Improvement Co. and the Manhattan Trust Co. (pp. 473, 477).

Garretson had been trying to sell the bonds without success since the summer of 1890 (*vide supra*). He had vainly endeavored to get 90 for them before the financial crisis of November, 1890. A sale at 75 after that occurrence was in every respect fair. Garretson was at first not able to carry out his agreement with the Manhattan Trust Co. made on November 1, 1890, for it turned out he had not sold

the Sioux City & Northern bonds in Boston, as he represented to Messrs. Waterbury and Goodwin. This fact caused trouble between the parties.

He did, however, succeed in selling them to Tod & Co. in January, and then he made the arrangements to complete his purchase, which are embodied in the contract of January 28, 1891. Beyond the fact that Strong & Cadwalader drew that contract, there is not one word in the evidence to justify the unprofessional and uncalled-for criticisms and the utterly baseless inferences set forth in the Appellant's Brief on Facts, at page 128 *et seq.* There is not a syllable of evidence to show that Strong & Cadwalader had any knowledge of the fact that the 500 Nebraska & Western bonds which the Manhattan Trust Co., at Mr. Goodwin's request, had agreed to hold "for account of A. S. Garretson, and sub-"ject to his order, as collateral to the loan" of $325,000 (Ex. 171, p. 1425) "were up as security to the Union Loan and Trust Company" (Brief on Facts, p. 129). There is not a syllable of evidence to indicate that the shipment of those bonds to Sioux City was ever submitted to or brought to the knowledge of Messrs. Strong & Cadwalader. On the contrary, Mr. Waterbury being asked:

"Now, so far as you know, did Strong & Cadwalader or any member of that firm have any knowledge of the shipment of five hundred Nebraska & Western bonds in the Union Loan & Trust Company of Sioux City until within the last week"? replied: "As far as I know, they knew nothing about it whatever" (pp. 1145-6).

The further statements that "it was Mr. Wickersham's duty to know, as the Manhattan Trust Company knew, the contract under which they were sent West, and that the correspondence showed the probability, if not the certainty, that they had been so sent "as security to a loan of money from the Union Loan and Trust Company"—simply shows the lengths to which appellant's counsel have been willing to go in an unscrupulous but vain

effort to charge defendants with some sort of notice of any kind of claim by the Union Loan and Trust Co. to the securities in controversy.

The only justification for the statement in appellant's brief that Strong & Cadwalader ever acted as Garretson's counsel (B. on F., p. 129) is found in the fact that the Trust Company having, in their contract of January 28, 1891, agreed to lend its good offices towards an adjustment of the affairs of the Improvement Company and of said receivership (p. 1107), they referred him to their own counsel, Strong & Cadwalader (p. 1429), who caused the title to the Nebraska & Western bonds to be made in Garretson, by selling them at auction under the various notes pledging the same, with the formalities necessary to cut off all equities of redemption; in which connection the requisite notices were signed by Messrs. Strong and Cadwalader as attorneys in fact for Garretson by his special authorization (pp. 1488, 1491, 1493). A characteristic effort by appellant's counsel to lead Garretson into allegations of further relation, will be found at pages 792-93, but he could not but testify that in the arrangements and negotiations for the million and a half dollar loan Messrs. Strong & Cadwalader were acting as counsel for Tod & Co., not for him (p. 793).

Allegations of fraudulently inducing Garretson to purchase Nebraska bonds, no evidence of notice of claim of Union Loan and Trust Co.

BUT EVEN IF IT WERE TRUE, AS CLAIMED, THAT GARRETSON WAS INDUCED BY FALSE REPRESENTATIONS TO BUY THE NOTES SECURED BY NEBRASKA AND WESTERN BONDS, AND THAT STRONG AND CADWALADER WERE INFORMED THAT SUCH WAS THE CASE, IT DOES NOT FOLLOW THAT EITHER THEY, OR J. KENNEDY TOD & CO. HAD ANY NOTICE OF ANY INTEREST OF THE UNION LOAN AND TRUST COMPANY OF SIOUX CITY IN THE SECURITIES IN CONTROVERSY.

What information Strong & Cadwalader obtained about the various pledges of the bonds, is shown from the notices of sale, pursuant to the

pledge, under which they made title for Garretson (see pp. 1486–1494).

First, the $1,000,000 of Nebraska and Wyoming bonds, which were pledged to secure the $500,000 of Wyoming Pacific Improvement Co. notes held by August Belmont & Co., and which were purchased by Garretson on November 1, 1890 (pp. 1427, 1428-9, 1433), were sold by Manhattan Trust Company (p. 1242) on notice to the Improvement Co. under the terms of the loan agreement of February 1, 1890 (Defts.' Ex. 27–28, p. 1486), on the request of Garretson as the holder of those notes (Defts.' Ex. 28b, p. 1487).

Next, $500,000 of Nebraska and Wyoming bonds, which had been pledged under the same agreement to secure the $250,000 of notes held by Garretson & Hedges (pp. 1488-9; Defts.' Ex. 11 to 19, pp. 1474-6), were also sold in like manner (p. 1243) by Manhattan Trust Co (p. 1468, Defts.' Ex. 31, p. 1490), on the request of Garretson as holder of the notes (Defts.' Ex. 31a, p. 1491).

$450,000 of the bonds and 25,833 shares of the stock were also sold (p. 1242) to satisfy their pledge to secure the following notes as enumerated in the notice given May 16, 1891, by Garretson to the Receiver of the Wyoming Pacific Improvement Company, viz.: Note dated June 30, 1890, $110,000 payable Manhattan Trust Company, or order, on which a balance of $90,000 due. Note dated August 1, 1890, $100,000, payable British and American Trustee and Finance Corporation, or order, on which $50,000 due. Note dated September 19, 1890, $100,000, payable same. Note dated October 1, 1890, payable Manhattan Trust Company, or order, $50,000; and two notes for $50,000 each, payable Manhattan Trust Company, or order, on demand (p. 1489).

$80,000 of the same lot of 450 bonds had also been pledged to secure a note for $40,000 to the order of the United States Transfer and Exchange Association

(p. 1418), and they were accordingly sold under that note also (Defts.' Ex. 32, pp. 1492, 1243).

Thus the contemporary evidence entirely corroborates the testimony of Messrs. Waterbury and French (pp. 1418–1279) as to the fact that these bonds and stocks were pledged for those particular notes; that the bonds referred to in the later notes were the same 450 bonds described in the note of June 30th, and not new bonds, and that there was no over-issue of bonds or wrongful re-hypothecation as appellants endeavor to make out (Brief on Facts, pp. 115–130).

There still remained $633,000 of bonds, $600,000 of which had been pledged to secure the remainder of the loan of $1,050,000 under the agreement of February 1, 1890, and of which F. O. Matthiessen held $100,000; Theodore A. Havemeyer, $100,000, and Manhattan Trust Company, $100,000 (pp. 1188, 1417).

Those notes matured December 8, 1890, and pursuant to the agreement made with Garretson on November 1, 1890, that such notes should be renewed or placed elsewhere, and that in carrying out such renewals Messrs. French and Waterbury should be authorized to use all of the bonds and stock of the Nebraska and Western Railway (*Ex.* 8, p. 950), except the $500,000 held specifically for the loans from Garretson and Hedges, and which were sent to Sioux City on December 2, 1890, $270,000 of such notes were renewed by various notes made payable in different amounts, taken by the parties who had underwritten the bonds under the agreement of February 1, 1890 (p. 1470), such notes being secured by pledges of the bonds, the loans being at the rate of 40 per cent. of the face value of the bonds pledged to secure their payment (pp. 1427–8), making $675,000 of bonds pledged to secure $270,000 of notes. Of these bonds 540 had been originally pledged under the $1,050,000 loan agreement of February 1, 1890. The balance $135,000 were taken from the other bonds under

Garretson's authorization above referred to. Garretson afterwards purchased those notes, and the 675,000 of bonds were sold on June 24, 1891, to satisfy that pledge (p. 1493).

We have recapitulated the evidence on these points at some length because the appellants have devoted so large a portion of their brief to the effort to create an impression that the Manhattan Trust Company and its officers were guilty of fraudulent acts in connection with these transactions, and while, even if all they claim in that regard were conceded, they would still have entirely failed to establish any interest of the Union Loan and Trust Company in the securities in controversy, or any notice of such interest to Tod & Co. or the Union Debenture Co., when they advanced $1,500,000 in cash to Garretson, or any notice to the holders of the notes who bought and paid for them in faith of the pledge to Tod & Co as their trustees, still the Court ought not to be misled into believing that a transaction susceptible of a perfectly simple and innocent explanation involved the commission of wholesale frauds.

So far as the claim that the pledges of the securities were in violation of any rights of the Union Loan and Trust Company are concerned, the evidence has clearly established that E. R. Smith, its active manager, sent such of the collateral as was in his custody to Tod & Co., at Garretson's request, to be used as collateral to the loans negotiated through them, and with full knowledge of their purpose (pp. 769, 662, 665, 1726–7, 785–6).

And counsel for appellants inadvertently concede away their entire case by the statement on page 144 of their brief that: "*Smith is not shown ever to* "*have had any knowledge of or connection with* "*any pledge of bonds at any time, nor of any de-* "*livery of bonds,* EXCEPT FOR HONEST, LEGITIMATE "AND NECESSARY PURPOSES HERETOFORE SET FORTH" (p. 144).

Some effort is made (in Appellant's Brief on Facts,

pp. 139-142) to contradict Mr. Tod's testimony to want of any notice of adverse claims (pp. 1318-1320) by pointing to a letter written by Tod & Co. to Garretson on November 30, 1891 (pp. 999-1000). This letter acknowledges receipt from Garretson of his letter of November *5th* (a misprint for *25th*). The letter is printed on page 1542 of the record.

The claims mentioned in Garretson's letter were those made by intervening petition in the Nebraska and Western foreclosure suit, and which the final decree required to be secured by the purchaser (p. 1664). About the time of the confirmation of the sale, one NEGUS also presented some claim. Tod & Co. wrote Garretson on November 20, 1891: "We regret to learn from Messrs. Strong & Cadwalader that Mr. Negus is giving you further trouble" (p. 1019), and on November 27th: "We "were glad to learn from Messrs. Strong & Cad-"walader this morning that the Court has denied "Mr. Negus' intervening petition" (p. 1019). What this claim was does not appear, nor anything more than that Garretson had settled all other claims against the Nebraska and Western road, see decree confirming sale October 30, 1891 (pp. 1663-4), and that, therefore, the title to the collateral given Tod & Co. under the million-dollar loan was complete and clear, and those matters were closed up, so far as they concerned them.

It further appeared that in connection with the purchase of the Nebraska and Western bonds, Garretson executed an agreement to indemnify the Manhattan Trust Company against any claims of subscribers to the Wyoming Pacific Improvement Co. under the first plan (Pet.'s. Exs. 81-82, pp. 1038-40), which had been abandoned (pp. 817-18, 1437-8), and in some manner gave the Trust Co. a prior lien to the extent of $250,000 upon the securities pledged to Tod & Co. as security for the demand loan of $1,000,000 to secure performance of this agreement. This agreement is not in evidence, but on November 14, 1891, Messrs. Tod & Co. wrote to Garretson,

complaining that it had been served upon them, and again on November 21st, they wrote to say that "Messrs. Strong & Cadwalader explained that the action was taken entirely at their instance" (p. 999).

In January, 1893, when the $1,000,000 loan was paid, and the $1,500,000 loan contracted, the matter could not be carried through without removing this lien, and no liability having, apparently, arisen under the agreement, it was arranged to subordinate the lien of the Trust Co. on the securities pledged to Tod & Co to secure the Pacific Short Line Bridge notes (p. 1014), and a new agreement was executed by Garretson, printed on pages 666-7, creating a prior lien to the extent of $250,000 on such securities for the purpose aforesaid (p. 666). Mr. J. Kennedy Tod on his direct-examination, on behalf of defendants, on August 31, 1894, testified, as printed in Appellant's Brief of Facts, page 139, that neither at nor before the closing of the $1,500,000 loan had he had any knowledge or information that any others than the parties to those agreements had any interest in or claim to the securities pledged for the loan. On July 11, 1894, Mr. Tod being called and examined as a witness on behalf of the petitioner had testified that after the $1,500,000 loan was made "Mr. Garretson filed a paper with us which ran, as far as I can recollect, that after the payment of the loan of the million and a half was affected, the securities should not be released until certain claims of the Manhattan Trust Company, or of some individuals connected with it, I don't know who, had been satisfied" (p. 477).

After testifying, as above stated, on August 31st, he was further examined as follows:

"Q. Mr. Tod on your cross-examination you were "asked what if any claims to the bonds of the "O'Neill and Western Railroad and the stock of "the Sioux City and Northern you had known of. "Do I understand you to testify that the only

" persons ever claiming any interest in such bonds
" and stock were Mr. Garretson and his associates,
" named in the contract with the Pacific Short Line
" Bridge Company, and that company? Do you
" desire to correct that in any form?

" A. I at the moment forgot what I had testified
" some weeks ago, that the Manhattan Trust Com-
" pany served my firm with notice in the form of
" a letter from Mr. Garretson, and a copy of it is in
" evidence, to the effect that they, the Manhattan
" Trust Company, had an interest in those securities
" after the loan was paid. * * *

" Q. And aside from that claim was there any
" person that you ever heard of as claiming those
" securities?

" A. Never until Mr. Coombs appeared " (p. 1351).

3. The *facts* concerning the $1,500,000 loan, and the reasons for the introduction of the Pacific Short Line Bridge Company into the transaction, have been already set forth at sufficient length. The legal questions arising therefrom will be considered in their order.

CLAIM THAT DEFENDANTS HAVE ACTED IN AN UNCONSCIONABLE MANNER.

Some light is thrown upon the merits of petitioner's claim that defendants have acted in an unconscionable manner in refusing to reinstate their loan—the principal of which had matured—and turn over the control of the properties to the associated creditors of the Union Loan & Trust Company, by extracts from two documents in evidence in this cause.

In Mr. Coombs' first report to the creditors of the Union Loan & Trust Company, dated September 1, 1893 (Petr.'s Ex. 87, p. 1046), the suggestion was made to them that by the canceling of the second mortgage on the Terminal Company's property, the Sioux City & Northern stock in Tod & Co.'s hands

would be worth 95 per cent. of its par value, and that the Bridge bonds, at least to the amount of $1,500,000, should be good.

In a letter addressed to the stockholders of the Credit Commutation Company by the petitioner's counsel, dated July 31, 1894 (Deft's. Ex. 119, p. 1515), this language is used: "It is to my mind now "clear, however, that the Sioux City & Northern "cannot pay interest on its bonds and the Terminal "rentals, too, just as it is clear that the O'Neill & "Western could not carry even $1,500,000 bonded "indebtedness of its own and pay enough tolls to "meet interest on the bridge bonds. Had Kennedy, "Tod & Co. allowed us to redeem, it might have "been different, *but that is not certain, for the "truth is that the terminals and bridge are not "merely in advance of and more expensive and ex-"tensive than the demand for them, but the demand, "though it exists, is withheld from us, as I tried to "show in my annexed argument.* The Sioux City, "O'Neill & Western while it stops at O'Neill cannot "do business enough to support the bridge, unaided "by other railroads, and nothing but a south-"western connection will enable it to do so. *The "Sioux City & Northern cannot carry the terminals "without more help than the railroads entering "Sioux City, under present conditions, can well "afford*" (p. 1518). "The Sioux City, O'Neill & "Western cannot afford to pay much to use any "terminal unless it can have a bridge to cross at bet-"ter rates than it now pays, and, indeed, can never "pay any appreciable sum for terminal purposes "while it remains a plug road about 130 miles long. "The Sioux City & Northern as a part of the Great "Northern could afford to pay a good rental. J. "Kennedy Tod & Co. testified on the 16th of this "month that this rental should not be over $10,000 "or $12,000 per year. *This is all there is to it;* for "one of the remaining roads, the Union Pacific, has "abandoned Sioux City, and the other three are "controlled by the Chicago & Northwestern, whose

"interest it is not to have either the terminals or "another bridge, since that company owns the ex- "isting bridge" (p. 1519).

This is all there is to the great "conspiracy" by which the Great Northern Railroad has acquired for $350,000, 3,600 shares of stock, of no present appreciable value, and the parties who advanced $1,500,000 in actual cash upon the bonds of the O'Neill & Western Road, and 10,200 shares of stock of the Sioux City & Northern, have been for four years without any interest on their investment and have by the pendency of this proceeding been prevented even from working out a scanty return for their principal from the collateral, the value of which is so well described in the "frank and confidential" communication of the counsel for the actual plaintiffs to his clients.

Opinion of Shiras, J.

Decision of Circuit Court.

Judge Shiras, in his opinion in the Circuit Court, brushed aside as of no consequence all of the transactions prior to the loan under which the defendants obtained the securities, so elaborately discussed by the appellants' counsel, and with which they have so deluged the case, as of no relevancy to the actual issues presented for decision, and turned at once to a consideration of the contracts under which the defendants obtained possession of and claim title to the 10,600 shares of Sioux City and Northern stock, and the $2,340,000 of Sioux City, O'Neill and Western bonds held by them (pp. 388-390). After a brief review of the formation of the syndicate, and its dealings with the Union Loan and Trust Company, the Court drew the conclusion that "it seems clear that the Trust Company *as against* "*the members of the syndicate* is entitled to the "benefit of the securities which were placed in its "possession, and upon the faith of which *it may be* "*assumed it endorsed the syndicate paper;*" but that it was fairly deducible "from the evidence that

"the Trust Company parted with the possession of "the securities, *knowing that it was intended to re-* "*hypothecate them*" (p. 392), and that "it is not "now open to the Trust Company to repudiate the "acts of its secretary and treasurer in regard to "these securities, by whose action in placing the "same in the possession and under the control of "Garretson, the latter was enabled to repledge the "same as security for further advances" (p. 393). That "*the fair inference from the entire evidence is* "*that the Trust Company consented to the repledg-* "*ing of these securities, in order that further funds* "*might be procured for carrying on the work in* "*question*, but by so doing it did not abandon its "lien upon or equity in the securities, but only "subordinated its rights to those created by the re-"pledging of the securities" (p. 394).

That the sale of the securities by Tod & Co. under the provisions of the trust agreement of December 31, 1892, did not divest the Trust Company, or its assignee, of this junior lien on the securities, and that its right to redeem by paying the amount secured by the trust agreement remained, because the $1,500,000 of notes were not purchased in the ordinary course of business, nor in fact issued by the Bridge Co. in connection with its business, but were made at the dictation of the Syndicate and Tod & Co., *and were a fraud on the Bridge Co.*, and the use of its name was in reality a matter of form merely, and was so understood, and that the transaction must be considered *as a loan of $1,500,000 to the Syndicate*, secured by a pledge of the collateral, *which lien is superior to that existing in favor of the Trust Co. because accompanied by possession of the stock and bonds* (pp. 395-7); and the Court accordingly held and decreed that the intervenor had the right to redeem by paying to the defendants the sum of $1,500,000, with interest thereon from December 30, 1892, to the date of such payment.

Decree of Circuit Court.

As already stated, the Judges of the Circuit Court of Appeals were agreed that the defendant's lien

upon the securities was paramount to that of the intervenor, but they were divided on the question whether or not his right of redemption was cut off by the auction sale under the loan agreement, and therefore affirmed the decision of the Court below by a divided Court without opinion.

ARGUMENT.

I.

THE EVIDENCE FAILS TO ESTABLISH THE ALLEGED PLEDGE, OR *agreement* TO PLEDGE THE SECURITIES IN CONTROVERSY TO THE UNION LOAN AND TRUST COMPANY.

The petitioner has failed to establish the *facts* upon which his entire claim rests, namely, that by *agreement* between the Union Loan and Trust Company and the Syndicate, the Trust Company was entitled to the first lien upon and right to the possession of all the properties acquired with the proceeds of railroad syndicate paper, and the stocks and bonds representing such property; or that the securities were *actually deposited* with the Trust Company as collateral security "in trust for the benefit of whomsoever might be or become the purchasers of" Railroad Syndicate paper negotiated through the Trust Company.

Vide supra, pages 58 to 83.

It is a significant fact that the agreement by which the Syndicate was organized is silent as to how the notes they were to issue should be secured (Record, pp. 941–2).

The petitioner invokes the rule—

"That every express executory agreement in writing, whereby the contracting party sufficiently indi-

cates an intention to make some particular property, real or personal, or fund therein described or identified a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice."

3 Pomeroy's Eq. Juris., § 1235, cited and applied in
Walker *v.* Brown, 165 U. S., 654-664.

But here there is no such agreement in writing, and no competent evidence of an oral agreement, and the course of dealing between the parties during a period of four years is wholly contradictory of any such alleged pledge or agreement to pledge.

The utmost that can be deduced from the testimony is a general understanding that the securities obtained by the Syndicate in carrying on its enterprises should be used in furtherance of the Syndicate purposes.

The appellant also failed to show as a matter of *fact* that the properties represented by the securities in controversy were purchased or created by the proceeds of Syndicate paper, endorsed and negotiated by the Union Loan and Trust Company. On the contrary, it appeared that all the money which was expended in acquiring the interest which the Syndicate obtained in Nebraska and Western bonds and afterwards the Sioux City, O'Neill and Western bonds, except $625,000, was loaned by Messrs. Tod & Co. upon the pledge of the greater part of the securities in controversy; that however the funds by which the Sioux City and Northern Railroad was constructed were acquired, they were largely repaid out of the money paid by Tod & Co. in purchase of the Sioux City and Northern bonds. The claim to an equity on this ground therefore failed utterly.

II.

THE ENTIRE COURSE OF DEALING PURSUED BY THE UNION LOAN AND TRUST COMPANY IS AT VARIANCE WITH THE CONTENTIONS OF ITS ASSIGNEE THAT SUCH OF THE SECURITIES AS WERE EVER IN ITS POSSESSION WERE WRONGFULLY WITHDRAWN FROM ITS CUSTODY. THE AUTHORITY OF ITS OFFICERS TO ACT AS THEY DID CANNOT NOW BE QUESTIONED.

Whatever the agreement between the Trust Company and the Syndicate may be claimed to have been, the Trust Company parted with such of the securities as it had at any time in its possession, knowing that they were to be hypothecated to secure loans made to Garretson for the purposes of the Syndicate. It actively assisted in such hypothecations, and never once asserted any interest in the securities.

As Judge Shiras says: "It is entirely clear that E. R. Smith, the secretary and treasurer of the company, dealt with these securities as though he had full authority from the company so to do, and he obeyed Garretson's instructions in regard to the same without demur, and it does not appear that the Trust Company or any officer thereof ever objected to such disposition of the securities; and, furthermore, so far as the evidence in this case discloses, the general management of the business of the Trust Company was entrusted to Smith, with very little, if any, supervision on the part of the directors or other officers of the corporation" (p. 392).

The power of the executive officers of a financial corporation to bind it by his acts is clearly affirmed in the case cited by Shiras, *J.*

Martin *v.* Webb, 110 U. S., 7.

In *Sherwood* vs. *Roundtree*, 32 Fed. Rep., 113, Speer, *J.*, held that even authority to exact usury

would be imputed to the principal from the general manner in which the agent, as a matter of public notoriety, had been allowed to proceed for a period sufficiently long to establish a course of business.

In *Leicester Piano Co.* vs. *Front Royal & Riverton Imp. Co.*, 55 Fed. Rep., 190, Dick, *J.* (Goff and Hughes, *JJ.*, concurring), held that a manufacturing corporation was bound by false representations as to its condition, made by its president, who was also its general manager, organizer, promoter and reorganizer, evidently laying stress upon the power which had been given him by the course of business rather than upon his office as president.

In *Moore* vs. *Gans*, 113 Mo., 98, it was held that the secretary and treasurer of a corporation who had control of its business could effectually assign a contract without the action of the Board of Directors. Gantt, *P. J.*, saying: "The power of an agent or officer of a corporation to bind his principal is governed by the law of agency, *and where an officer has been permitted to manage all the business of a corporation, his authority to bind it will be implied from the apparent power thus conferred upon him.*"

This is precisely the case here.

In *5th Ward Savs. Bk., vs. 1st Nat. Bk.*, 48 N. J. L., 513-527, De Pue, *J.*, said:

"When in the usual course of business of a corporation an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. These are simply instances of the application of the principle *that usual employment is evidence of the powers of an agent*, and a responsibility will be laid upon the principal for the acts of his agent within the apparent authority so conferred upon

the agent, a doctrine which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limitations. In such cases the authority of the officer does not depend so much on his title or on the theoretical nature of his office as on the duties he is in the habit of performing."

In *5th Nat. Bk.* vs. *Navassa Prosphate Co.* (119 N. Y., 256), it was held that it was a question of fact to be submitted to the jury whether the course of business of a corporation had authorized its president and treasurer, who was also its general manager, to endorse for the corporation promissory notes, and that if such authority was conferred, it would protect the holder without proof that the holder knew in advance of the exercise of the authority and its ratification.

To similar effect are:

Martin vs. *Niagara Falls Co.*, 122 N. Y., 165.
Bell vs. *Bank*, 57 Fed. Rep., 821.

In *Hanover Bank* vs. *American Dock & Trust Co.*, 148 N. Y., 613, the defendant company was held liable to the plaintiff upon certain warehouse receipts which it had taken as collateral security to a loan of money made to the vice-president personally; the certificates having been fraudulently procured by him to be issued in his own name. The facts in the case were held to furnish a conclusive inference that the directors of the company, by their acquiescence in the vice-president's acts and their neglect to supervise what he was doing, authorized the otherwise illegal acts.

The Court says: "If, through inattention or otherwise, the principal suffers his agent to act beyond his authority, without objection, he is bound to those who were not aware of any want of authority to the same extent as if the requisite power had been directly conferred (New York and New Haven

Railroad Co. *v.* Schuyler, 34 N. Y., 30, 58). Under such circumstances the principal is estopped from asserting the truth by his own conduct in inducing third persons to believe that the agent had due authority to act in a given case (*Id.*, 66). If, therefore, Stone issued certificates to himself for cotton, to the knowledge, express or implied, of defendant's directors, their acquiescence in such acts, after allowing them a reasonable time to put an end to actions of that nature, would estop them from denying, as to purchasers for value, that the power to so certify in fact existed. Acquiescence under such circumstances would permit the inference that the act of certifying in his own favor was within his actual authority (*Martin* vs. *Niagara Falls, &c., Co*, 122 N. Y., 165), and with that power in existence, or by implication presumed to exist, the issuance of the certificate in question would come within the scope of his authority." And again, "*While it does not appear that they*" - the directors of the company— "*actually knew of these transactions, it was a question of fact for the jury to say whether they ought not to have known, under all the circumstances, as their ignorance was no excuse, unless they were reasonably diligent in supervising the methods and details of conducting the business under their control.*" The Court quotes from the opinion in *Martin* v. *Webb*, 110 U. S., 7, 15, as directly in point.

See also the leading case of N. Y. & N. H. R. R. Co. *vs.* Schuyler, 34 N. Y. Rep., 30.

The evidence is clear that Smith was left in undisputed control of the Union Loan and Trust Company. There was a *loan* committee of which he was a member, but it never met; Smith managed the company entirely—endorsed in its name every note it put out, signed every letter that it wrote, and was, so far as the outside world went, the Trust Company.

With full knowledge of Garretson's transactions with Tod & Company in procuring the loan of $1,000,000 in October, 1891, and in selling the notes

of the Bridge Co. for $1,500,000 in January, 1893, he transmitted large portions of the Sioux City & Northern stock to Tod & Co., just as he had previously requested the Manhattan Trust Co. to issue to Garretson *individually* a receipt for the Sioux City and Northern bonds; and throughout all the transactions he actively assisted Garretson in inducing Tod & Co. to believe that *he* - Garretson—was the owner of the stock and bonds tendered by him as collateral to the loans he had negotiated.

In the case of the Sioux City and Northern bonds it cannot be disputed that Garretson was entrusted in the understanding of all parties with the right to sell, and that the Union Loan and Trust Company received the proceeds of a million dollars of the bonds, thus ratifying that transaction; and the proceeds of the balance were applied with Smith's full knowledge, without any objection on his part or that of any other officer or the directors of the Union Loan and Trust Co., in taking up notes secured thereby, which had been given by Garretson *to acquire the very Nebraska Western bonds which he afterwards pledged to Tod & Co. and which were later exchanged for the bonds of the Sioux City, O'Neill and Western Railroad now in controversy.*

On all the evidence, it must be held that Smith's acts were performed with the actual or implied authority of the directors of the Union Loan and Trust Company, and are binding upon it.

III.

SUCH OF THE SECURITIES IN CONTROVERSY AS WERE EVER IN THE POSSESSION OF THE UNION LOAN AND TRUST COMPANY WERE ENTRUSTED BY IT TO GARRETSON IN NEGOTIABLE FORM WITHOUT ANYTHING TO INDICATE THAT IT HAD ANY INTEREST IN THEM, WITH THE KNOWLEDGE THAT GARRETSON INTENDED TO PLEDGE

THEM TO MESS. J. K. TOD & CO. AND THEY WERE SO PLEDGED. THE CORPORATION AND ITS ASSIGNEE AND ITS CREDITORS ARE NOW ESTOPPED THEREBY FROM CLAIMING ANY PRIOR EQUITY.

In no instance did any of the securities claimed in this cause to have been pledged to the Trust Company ever stand in its name. The Trust Company delivered the securities either to Tod & Co. or to Garretson for pledge to them, *in such form as to enable Garretson* to hold himself out as the owner thereof. *These facts estop the company and its assignee from now asserting title to the securities.*

Donald *v.* Suckling, L. R., 1 Q. B., 585.
McNeil *v.* Tenth Natl. Bank, 46 N. Y., 325.
Merchants' Bank *v.* Livingston, 74 N. Y., 223.
Moore *v.* Metropolitan Bank, 55 N. Y., 41.
Talty *v.* Freedmen's Savings Bank, 93 U. S , 321.
Calais S. S. Co. *v.* Scudder, 2 Black, 372.
Railroad Co. *v.* Sprague, 103 U. S., 756.

In *McNeil* v. *Tenth Natl. Bank*, the plaintiff deposited with brokers, to secure a balance due them on account for carrying stocks, a certificate of stock in a railroad company standing in his name, and with transfer on back signed by him in blank. The brokers, without plaintiff's knowledge or authority, pledged this certificate to defendant as security for a loan. *Held*, defendant entitled to hold the shares as security for its advances.

RAPALLO, *J.*: "The true point of inquiry in this case is, whether the plaintiff did confer upon his brokers such an apparent title to, or power of disposition over the shares in question, as will thus estop him from asserting his own title, as against parties who took *bona fide* through the brokers." *Held* he

did; that where the owner entrusts to another not merely the possession of the property, but also written evidence, over his own signature, of title thereto, he is estopped. That the common practice of passing title to stock by delivery of the certificate with blank assignment and power has been repeatedly estabished in courts, and that as between the parties, the delivery of the certificate with assignment and power endorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that by the charter or by-laws of the corporation, the stock is declared to be transferable only on its books.

The cases are elaborately reviewed in the opinion.

In *Weaver* v. *Barden*, 49 N. Y., 286, *held* where rightful owner has invested another with the usual evidence of title or an apparent authority to dispose of it, he will not be allowed to make claim against an innocent purchaser for a valuable consideration dealing upon the faith of apparent ownership or right of disposition.

Talty v. *Freedmen's Savings & Trust Co.*, 93 U. S., 321,

was a case where plaintiff endorsed a city warrant in blank and pledged it with an agent to secure payment of his note. The agent sold the warrant to defendant, who bought in good faith without notice. *Held*, plaintiff could not recover the collateral without reimbursing defendant the amount paid.

To same effect is *Cowdrey* v. *Vandenburgh*, 101 U. S., 572, citing and following McNeil *v.* Tenth National Bank (46 N. Y., 335).

Transfers of stock by delivery of certificates of stock endorsed in blank are valid and complete as between the parties, even in States where statutes provide for registry on the books of the corporation.

Bank v. *Cutler*, 49 Me., 315.

Where the owner entrusts a stock certificate endorsed in blank to another, who sells or pledges it for value, the latter may hold the stock.

First Natl. Bank *v.* Lanier, 11 Wallace, 369.

Cowdrey *v.* Vandenburgh, 101 U. S., 572.

Leitch *v.* Wells, 48 N. Y., 585.

In *Leitch* v. *Wells*, 48 N. Y., 585:

John Kellogg, an executor, transferred certain bank stocks of the estate to his wife, Paulina W., and had the transfer entered on the books of the bank and new scrip issued in her name in the usual form. This transaction was held void in a suit by the beneficiaries against Kellogg and wife, but in the meantime, the wife had executed a blank power of attorney in the usual form, and the stock had been pledged to the American Express Company as collateral for loans to John Kellogg. *Held*, that the Express Company was entitled to hold the stock as against the beneficiaries of the estate, the Court saying: "The stock in question stood in the name of "Paulina W. Kellogg, and the certificates issued "by the banks, of her title thereto, were evidence "of its absolute ownership by her.

"There was nothing in them, or connected there-"with, to show or indicate a trust in favor of any "other person. Their production to the Express "Company, with a power of attorney signed by her "in the usual form for the transfer of stock in in-"corporated companies, warranted and justified it "in making the loans it did on the assumption of "such ownership."

Where the owner of a note and mortgage has placed them in the hands of another with the proper endorsement and assignment to make them transferable, the subsequent *bona fide* pledgee of the same for value, *though such pledge be unauthorized, and the misappropriation by the one who is entrusted with the legal title*, will be protected.

Swift *v.* Smith, 102 U. S., 442.
See also Allen *v.* St. Louis Bank, 120 U. S., 20.
People's Bank *v.* National Bank, 101 U. S., 181.
Railroad Co. *v.* Schulthe, 103 U. S., 118.

THIS ESTOPPEL OPERATES AGAINST THE VOLUNTARY ASSIGNEE UNDER A STATUTORY ASSIGNMENT WITH THE SAME FORCE AS AGAINST THE CORPORATION, AND IS ALSO BINDING UPON THE CREDITORS SEEKING TO ENFORCE ALLEGED RIGHTS IN HIS NAME.

The appellant's contention that as assignee for the benefit of the creditors of the Union Loan and Trust Company he is not bound or affected by any acts or proceedings of that company which would conclude or estop his assignor, is entirely unfounded. There is no conflict between the State and Federal courts in Iowa on this point. In both courts it has been held that "If any property actually belonging to the debtor is in possession of third parties, or if the *legal* title thereto is in a third party, the assignee may recover the same by proper action."

In 1884 it was decided by the United States Circuit Court for the Southern District of Iowa (per Shiras, *J.*), in the case of

Rumsey vs. *Town*, 20 Fed. Rep , 558,

that a voluntary assignee for the benefit of creditors under a general assignment executed in Iowa, succeeds to all the rights of his assignors and is affected by all the equities against him; but that equities or rights belonging to a creditor are not, by operation of law, transferred to the assignee.

SHIRAS, *J.*, says: "In New York, Connecticut and "other States the power of the assignee is enlarged "by statutory enactment so as to include the right "to treat as void all transfers and acts done by the "assignor in fraud of creditors. The Iowa statute "regulating assignments for the benefit of creditors,

"being Chapter 7, Tit. 14, Code, clearly recognizes "the fact that an assignment is a purely personal "right of the debtor in the first instance. * * * "Section 2127 of the Code defines the powers of the "assignee as follows:

"'Any assignee, as aforesaid, *shall have as full* "'*power and authority to dispose of all estate, real* "'*and personal, assigned as the debtor had at the* "'*time of the assignment*, and to sue for and re- "'cover, in the name of the assignee, everything "'belonging or appertaining to said estate, and, "'*generally, do whatsoever the debtor might have* "'*done in the premises.*'

"This section is wholly silent touching the rights "and equities of creditors, and would seem to "measure the rights of the assignee by those of "the debtor. All property belonging to the estate "passes to the assignee, and he can recover the "same by proper suit in his own name. If any "property actually belonging to the debtor is in "possession of third parties, or if the legal title "thereto is in a third party, the assignee may re- "cover the same by proper action. *Thus, if the* "*debtor has, in fraud of creditors, conveyed prop-* "*erty to a third party, thus concealing it from cred-* "*itors, but actually being the owner thereof, the as-* "*signee can maintain suit therefor, under the sec-* "*tion of the Code in question, because in truth the* "*property thus transferred belongs to the debtor,* "*and passes, by the deed of assignment, to the as-* "*signee.* In such a case equity would not aid the "debtor in recovering the property, not because he "is not really the owner thereof, but because he "had been guilty of a fraud, and therefore within "the rule that 'he that hath committed iniquity "'shall not have equity.' The assignee, however, "would not be affected by this disability, not being "personally a party to the fraud, and he could "therefore be heard to assert that the property in

" question really belonged to the estate of which he " is trustee. When, however, a given question " turns upon equities or rights belonging to one or " more of the creditors, can it be maintained that, " by operation of law, these equities have been " transferred from the creditors to the assignee? " Certainly, at common law, no such effect can be " attributed to the deed of assignment executed by " the debtor. The statute of Iowa regulating as- " signments does not, in express terms, so declare; " and, in the absence of positive enactment enabling " the assignee to enforce the equity of the creditor, " it is difficult to see upon what the claim is based."

In *Sandwich Mfg. Co.* v. *Wright*, 22 *Fed Rep.*, 631,

the conclusions reached in the foregoing case were reaffirmed, the Court saying: "The right of cred- " itors to attack a mortgage as fraudulent, *growing* " *out of equities existing in their behalf, does not* " *pass to the assignee*, in the absence of statutory " provisions to that effect, and none such are found " in the statutes of Iowa."

Precisely the same principle was declared by Brewer, *J.*, in

Clapp v. *Nordmeyer*, 25 F. Rep., 71, citing Sandwich Mfg. Co. *v.* Wright, *supra*, 22 Fed. Rep , 631,

and by the U. S. Circuit Court in Montana, in Goff *v.* Kelly, 24 Fed. Rep., 327.

In *Schaller* v. *Wright*, 70 Iowa, 667, decided two years after *Ramsey* v. *Town*, *supra*, it was held as stated in the head note: "A deed of assignment for the benefit of creditors vests in the assignee the title of all the property of the assignor, even though it be not described and specified therein (Code, § 2117); and so, where, on the day when the deed of assignment was made, the

assignor made a voluntary conveyance to his wife of certain real estate in fraud of his creditors, *held that such real estate nevertheless passed to the assignee, and that chancery would remove the cloud on his title arising from the* fraudulent conveyance. The rule which denies the fraudulent grantor the right to recover such property in equity does not apply to his assignee."

The decision in *Pillsbury* v. *Kingon*, 33 N. J. Eq., 287, cited by the Court in support of this decision, is in harmony with this decision, so far as it asserts, as did Shiras, *J.*, in *Ramsey* v. *Town*, *supra*, that a conveyance made by an insolvent debtor in fraud of his creditors is *void*, and the property conveyed is assets for the payment of the creditors; but the further decision that an assignee for the benefit of creditors under a New Jersey assignment might maintain a suit to set aside a fraudulent conveyance of chattels made by the assignor, was based upon a consideration of the provisions of the statutes of that State, which are in effect a bankruptcy act, providing for a full release and discharge of the assignor by all creditors who come in under the assignment (see pp. 299–300); and therefore the Court in construing the powers of the assignee so broadly, says: "Considering that the assignment creates a "trust for the benefit of all the creditors of the as- "signor, and that the legislative purpose was to se- "cure an equal and just division of the estate of the "debtor among his creditors, a construction less "comprehensive will defeat the legislative purpose. "In virtue of the trust so created the assignee be- "comes the representative of and actor for cred- "itors, and his powers should be so construed as to "enable him to carry into full effect the purpose "which the statute designed."

Mehlhop v. *Ellsworth*, 95 Iowa, 657, merely held that, where an assignee had sued to set aside a chattel mortgage made by his assignor previous to the assignment and had been defeated, the judg-

ment in such suit was conclusive upon a creditor who had filed his claim with the assignee.

The Circuit Court in the case at bar made no ruling at variance with these decisions. The evidence did not establish, nor did the Court find, either that the Union Loan and Trust Company had *owned* the securities in controversy, *or* that they had been *fraudulently* transferred by it, prior to the assignment, so as to entitle the assignee to treat the transfers as void and recover the securities as property belonging to his assignor, under the authorities above *cited*.

Judge Shiras' *opinion* says:

"It is claimed on behalf of the Trust Company " that it has been wrongfully deprived of the actual " possession of these securities, and that it is not " bound by the transaction whereby the possession " thereof has been transferred to Tod & Co., as " hereinbefore recited. While there is some force " in this contention, still, taking the entire evidence " into consideration, *it is fairly deducible therefrom* " *that the Trust Company parted with the possession* " *of the securities, knowing that it was intended to* " *rehypothecate them.*" * * *

"The facts in the case * * * bring the same " fairly within the rules * * * enunciated by " the Supreme Court (in Martin *v.* Webb, 110 U. S., " 7), and justify the conclusion that it is not now " open to the Trust Company to repudiate the acts " of its secretary and treasurer by whose action in " placing the same in the possession and under the " control of Garretson, the latter was enabled to " repledge the same as security for further ad- " vances" (Record, pp. 392-3).

The question advanced by the appellants as one of the grounds for invoking the exercise of this Court's discretionary power of review of the decision of the Circuit Court of Appeals, viz., whether the

Federal courts in Iowa are bound by the decisions of the Supreme Court of that State as to the rights of assignees of insolvent debtors, does not arise in this case.

Another principle also operates against the appellant.

It is not contended that the securities in controversy were ever delivered or pledged to the creditors of the Union Loan and Trust Company. The contention is that they were pledged to the Trust Company to secure it against liability upon its endorsements upon the so called "Railroad Syndicate" paper, which constituted only a portion of the liabilities of the Trust Company. The holders of such Railroad Syndicate paper are endeavoring in this proceeding to establish, through the assignee of the Trust Company, the alleged equities of the Trust Company. That is, in effect, an effort at subrogation to the alleged rights of the Trust Company in the premises.

Brandt on Suretyship and Guaranty, 2d Ed., § 324.

But "in subrogating the creditor to the surety's place as to any indemnity given him there can be neither increase nor diminution of rights as they actually existed in favor of the surety."

And subrogation will not be allowed when it is inequitable or will prejudice the rights of creditors.

Brandt, § 326.

See

Meyer v. *Evans*, 66 *Iowa*, 179.
Lyon v. *Council Bluffs Bank*, 29 F. R., 566.

In the case last cited the defendant bank held a chattel mortgage upon goods in the possession of Porterfield, a merchant, which it failed to record. *Held*, that one who dealt with Porterfield and sold him goods in reliance upon his possession and apparent ownership of the property covered by the

mortgage, and without knowledge of the existence of the mortgage, was entitled to priority of claim over the bank, which was estopped as against the parties thus misled from asserting the existence of a lien under his mortgage; that where the mortgagee intentionally withholds the mortgage from record, and aids the mortgagor in purchasing goods on credit from parties who do not know of the existence of the secret lien, the doctrine of estoppel is applied, in order to prevent the perpetration of fraud upon innocent parties.

These principles were applied in another case growing out of the failure of the Union Loan and Trust Company of Sioux City,

Wachusett Nat. Bank v. *Sioux City Stove Works*, 63 Fed. Rep., 366,

which arose on a bill filed by the holder of defendant's notes endorsed by the Union Loan and Trust Company, to set aside a chattel mortgage executed by defendant to the Union Loan and Trust Company, which had not been recorded until after its assignment to E. H. Hubbard, and the existence of which was unknown to plaintiff when it purchased the notes.

The Court found that the Trust Company had intentionally withheld the mortgages from record, and when negotiating the sale of the notes to the plaintiff had represented that the Stove Works had a capital of $200,000, an extensive plant, and were doing a prosperous business; and therefore *held* that it would be most unjust and inequitable to permit the Trust Company to maintain the superiority of the lien created by the mortgage as against the equity existing in favor of the bank; that as the mortgage ran only to the Trust Company for its protection against liability on its endorsements,

"the creditors now represented by the assignee "of the Trust Company can claim an interest in the "security *only on the principle of subrogation.* The "Trust Company, by endorsing the paper of the

"Stove Works, has become liable thereon to the "creditors, and, therefore, has the right to apply "the securities to the payment of the Stove Works "notes. In equity the creditors who have the legal "right to look to the assets of both maker and en- "dorser for payment are entitled to be subrogated "to the rights of the Trust Company in regard to "the securities held by it (Sheld. Subr., § 154). "* * * This is, however, an equity based upon "the right of the surety and to be worked out "through it (Hall *v.* Railroad Co., 13 Wall., 367; "Railway Co. *v.* Jurey, 111 U. S., 584; Phœnix Ins. "Co. *v.* Erie and W. Transp. Co., 117 U. S., 312)."

Held further, that the claim of the holders of notes of the Stove Works endorsed by the Union Loan & Trust Co. being only *through* the Trust Co. and as against that company the plaintiff could undoubtedly plead and maintain an estoppel on grounds stated in the opinion, "it follows that such estoppel "is also good *against the assignee of the Trust Com- "pany and the creditors who now seek to avail "themselves of the benefit of the mortgage secur- "ities.*"

AS THE COURT HELD, THE EVIDENCE DEMONSTRATES, BEYOND ANY REASONABLE DOUBT, THAT THE TRUST COMPANY WILLINGLY ASSISTED IN THE PLEDGE OF THE SECURITIES TO MESSRS. TOD & CO. TO RAISE FUNDS WITH WHICH TO PROMOTE THE SYNDICATE'S ENTERPRISE.

The intervenor further contends that because the Nebraska and Western bonds were overdue and the mortgage securing them in process of foreclosure when they were pledged to Tod & Co. under the million dollar loan, they were not negotiable instruments, and are not entitled to the protection of the law merchant, and Tod & Co. took them subject to the alleged lien of the Trust Company. But, whether negotiable or not, they were assignable choses in action, subject to pledge, and by virtue of

their assignability, become like any other pledged property, and subject to the same rules.

Thalimer vs. *Brinkerhoff*, 20 Johnson (N. Y.), 386.

The assignee of non-negotiable choses in action takes subject to every defense that would be valid between the *original parties;* but the defense, to be valid, must be one subsisting at the time the *debtor* receives notice of the assignment; for the assignment, with notice, imposes upon the debtor an equitable and moral obligation to pay the money to the assignee; and if the debtor actively misleads the assignee as to the existence of any defense or set off, *or remains silent when it is his duty to speak, he may* be estopped by such conduct from setting up such defense against the assignee; *and the assignee cannot be affected by secret trusts or acts unconnected with the subject of the contract.*

1 Am. & Eng. Enc. of Law (1st Ed.), 842, 843.

The cases are many to the effect that it is only the equities between original parties that affect the assigned right in the hands of the assignee.

Cases cited 1 Am. and Eng. Enc. of Law (1st Ed.), 843.

Even in New York, where a different rule obtains, it is held that a third party having equities may be estopped by his conduct to set them up.

See cases cited Owens *vs.* Evans, 134 N. Y., p. 519.

In *Cowdrey* vs. *Vandenbury*, 101 U. S., at page 575, this Court puts non-negotiable choses in action upon the same footing regarding their assignability and its effect, as tangible property on the streets; and it clearly indicates that a person otherwise entitled to assert superior equities can, by his conduct, deprive himself by estoppel of that right.

Field, *J.*, says: "The principle is well settled that when the owner of property *in any form* clothes another with the apparent title or power of disposition, and third parties are thereby induced to deal with them, they shall be protected."

In *Judson* v. *Corcoran*, 17 How., at 615, Catron, *J.*, says: "There may be cases in which a purchaser, by sustaining the character of a *bona fide* assignee, will be in a better situation than the person was of whom he bought; as, for instance, where the purchaser, who alone had made inquiry and given notice to the debtor, or to a trustee holding the fund (as in this instance), would be preferred over the prior purchaser, who neglected to give notice of his assignment and warn others not to buy." The Court distinctly holds that subsequent *bona fide* purchasers of non-negotiable choses in action are protected against latent outstanding equities of which they have no notice.

In *Baker* v. *Wood*, 157 U. S., 212, 216, the Chief Justice stated the rule with respect of the assignment of choses in action, not negotiable, to be that "the assignee takes subject to the equities between the debtor and the original creditor subsisting at the time of the assignment, or when notice is received thereof. *Where, however, equities between the original assignor and a subsequent assignee, or entirely in favor of third persons, are involved, and the unconditional power of disposition has been entrusted by such assignor to his assignee, the principle of estoppel applies in favor of purchasers in good faith and without notice.*"

These decisions are sufficient to establish that J. Kennedy Tod & Co., when they took an assignment in pledge of the choses in action, and took them into their possession, acquired a title which the intervenor's assignor under the circumstances can not dispute on the ground of any secret equity.

IV.

BUT EVEN IF THE TRUST CO. HAD A LIEN AND WERE NOT ESTOPPED TO ASSERT IT, THERE WAS AN UTTER FAILURE OF PROOF THAT TOD & CO., WHEN THEY RECEIVED THE PLEDGE OF THE COLLATERAL IN QUESTION FROM GARRETSON, HAD ANY *notice* OF ANY DEFECT IN HIS TITLE TO THE SECURITIES, OR OF ANY INTEREST OF THE UNION LOAN & TRUST COMPANY IN THEM.

The defendants' rights cannot be defeated without proof of actual notice of the defect in title or bad faith on their part.

Though they had been negligent in taking the securities, and omitted precautions which a prudent man would have taken, yet unless they acted *mala fide*, their title according to settled doctrine must prevail.

Cheever v. *Railroad Co.*, 150 N. Y., 59–66.

In *Murray* v. *Lardner*, 2 Wall., 857, it is said that the burden of proof lies on the person who assails the right of the possessor, and the question resolves itself into honesty or dishonesty.

A mere suspicion of defect of title, or knowledge of circumstances which might excite such suspicion in the mind of a prudent man, on the part of the taker of negotiable paper at the time of the transfer, will not defeat his title. The result can only be produced by bad faith, *and the burden of proof lies on the person who assails the right of the possessor.*

Murray v. *Lardner*, 2 Wall, 857.

"Vague rumor or suspicion is not a sufficient foundation upon which to charge a purchaser with knowledge of title in a third person."

Per Gray, *J.*, in *Stanley* v. *Schwalby*, 162 U. S., 255–276.

Calais SS. Co. v. *Scudder*, 2 Black, 372.

Clark v. *Evans*, 27 U. S. Ap., 640.

In *Clark* v. *Evans*, 27 U. S. Ap., 640, the Court said, "One who purchases a negotiable note for value before maturity does not owe the maker the duty of making active inquiry into the origin or consideration of the note before purchasing the same. His right to recover can only be defeated by showing *that he had actual* notice of the facts which impeach the validity of the paper. * * * A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite suspicion in the mind of a cautious person, or even gross negligence at the time will not defeat the title of a purchaser. That result can be produced only by bad faith, *which implies guilty knowledge or willful ignorance*, and the burden of proof lies on the assailant of the title.

And in *Williamson* v. *Brown*, 15 N. Y., 354, PAIGE, *J.*, said that the inference of fraud must be founded on clear and strong circumstances, and such inference must be necessary and unquestionable, and no more than ordinary prudence is required of the pledgee.

See also *Bank* v. *Delano*, 48 N. Y., 326;
Baker v. *Bliss*, 39 N. Y., 70.

The circumstances amounting to notice should always be *strictly proven*.

Calais SS. Co. v. *Scudder*, 2 Black, 372.
Townsend v. *Little*, 109 U. S., 504.
16 *Am. & Eng. Ency. of Law*, 796.

In the present case the securities tendered to Tod & Co. were always railroad bonds, payable to bearer, and certificates of stock in the names of Garretson, Hedges, Hornick or Haakinson, with transfers endorsed by them in blank; and these securities were, in large part, sent to Messrs. Tod & Co. by the Union Loan & Trust Co., at Garretson's direction, and with full knowledge that they were to be used as collateral to loans he was procuring, without a word to indicate that the Trust Co. had any interest

in them. None of the securities offered ever stood in the name of the Union Loan and Trust Co.; and in none of his dealings with Messrs. Tod & Co. did Garretson ever assume to act *for the Union Loan & Trust Co.* Smith alone assumed to represent that institution.

The fact that the vendor is an officer of the company whose securities he offers for sale, does not of itself preclude dealings with him, or throw a cloud on his title.

R. R. Co. v. *Sprague*, 103 U. S., 756.

Possession of a person not inconsistent with the record title, is not sufficient to put a purchaser on notice as to his rights.

Fassett v. *Smith*, 23 N. Y., 252.

A secret agreement, purposely concealed, cannot be set up against *bona fide* purchasers without notice.

Townsend v. *Little*, 109 U. S., 504.

And where the holder claims to be the owner of the stock, evidenced by a certificate in the name of another, with irrevocable power of attorney to transfer, he is possessed of the *indicia* of ownership and may pledge as the real owner, *and the pledgee is not even charged with notice of the rights of the person named in the certificate.*

Merchants' Nat'l Bank v. *Livingston*, 74 N. Y., 223.

McNeil v. *Tenth Nat. Bk*, 46 N. Y., 325.

Smith v. *Savin*, 141 N. Y., 315.

Information that others have contributed to the purchase price of property, coupled at the same time with advice that the holder is authorized to sell, is not notice of inconsistent rights of persons who have contributed.

Calais Steamboat Co. v. *Scudder*, 2 Black, 372.

A purchaser is not bound to look for latent equities.

Acer *v.* Westcott, 46 N. Y., 384.
Murray *v.* Lardner, 2 Wall, 110.
Bank of Metropolis *v.* N. E. Bank, 6 How., 212.

And where the question is what effect particular circumstances as a whole should have produced on the pledgee's mind, if they were equally consistent with the one decision or the other, *the doubt should be solved in favor of the pledgee.*

Calais St. Co. v. *Scudder*, 2 Black, 372.

In *Wilson* v. *Wall*, 6 Wallace, 83, Grier, *J.*, said:

"A chancellor will not be astute to charge a constructive trust on one who is acting honestly and pays the full and fair consideration without notice or knowledge. It is highly inexpedient for courts of equity to extend the doctrine. *When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as to enable the Court to say, not only that he might have acquired, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question.* THE QUESTION THEN, WHEN IT IS SOUGHT TO AFFECT A PURCHASER WITH CONSTRUCTIVE NOTICE, IS NOT WHETHER HE HAD THE MEANS OF OBTAINING AND MIGHT BY PRUDENT CAUTION HAVE OBTAINED THE KNOWLEDGE IN QUESTION, BUT WHETHER NOT OBTAINING IT WAS AN ACT OF GROSS OR CULPABLE NEGLIGENCE."

In *Townsend* v. *Little*, 109 U. S., 504, it is said that what makes inquiry a duty is *such a visible state of things as is inconsistent with a perfect right in him who proposes to sell.*

And see *Simmons Creek Coal Company* v. *Doran*, 142 U. S. 417, per Fuller, *C. J.*

There was nothing in the situation of the parties

to bring to defendants any intimation that the Union Loan & Trust Company claimed an interest in the securities.

In *Canajoharie Nat. Bank* v. *Diefendorf*, 123 N. Y., 191, cited by appellant, the plaintiff's cashier purchased the note at a large discount from a stranger, and under such unusual circumstances as should have put any ordinary business man upon inquiry as to his right to the note.

See an analysis of that case and a discussion of the rules of evidence as to notice affecting the *bona fides* of a purchaser in

American Ex. Natl. Bank v. *N. Y. B. & P. Co.*, 148 N. Y., 698 706.

A legal inference of fraud must be founded on clear and strong circumstances, and such inference must be necessarily unquestionable, and no more than ordinary prudence is required of the pledgee.

Williamson v. *Brown*, 15 N. Y., 354.
Cambridge Valley Bank v. *Delano*, 48 N. Y., 326.
Baker v. *Bliss*, 39 N. Y., 70.

The petitioner, evidence failing him, resorts to adjectives and characterizations to eke out his contentions.

But "epithets do not make out fraud," as Fuller, *C. J.*, said in *Kent* v. *Lake Superior Canal Co.*, 144 U. S., 75 91.

Nor can notice of latent equities not clearly shown to exist, be fastened upon pledgees who have advanced a million and a half of dollars on the faith of securities delivered to them in negotiable form, by the fecundite imaginings of ingenious counsel.

Even if the equities of the holders of the so called railroad syndicate paper were *equal* to those of the defendants, the title of the latter must prevail. The rule applicable is that in cases of alleged constructive notice, *where the equities are equal, the law*

will prevail, and the pledgee taking the legal estate has rights which prevail over a claimant who only has equal equities with him.

Some stress was laid by appellants upon the fact that the certificates for certain of the shares of Sioux City & Northern stock delivered to Tod & Company under the contract of December 31, 1892, stood in the name of "A. S. Garretson, trustee." It is claimed that *this* fact was notice of an interest of the Union Loan & Trust Co. in such stock. Certificates Nos. 41, 40, 44, 45, 47 and 48 were receipted for on the stubs of the stock book of the Sioux City & Northern Railroad, "*A. S. Garretson, trustee, by E. R. Smith*"; all of such certificates being so issued and receipted for between October 21 and November 3, 1891.

Of these certificates, No. 41 for 200 shares was originally sent by E. R. Smith, secretary to Tod & Company "*as collateral to a loan he* (Garretson) *is making with you*," on October 22, 1891 (pp. 662-4); Nos. 44 and 45 for 500 shares each, and No. 40 for 178 shares, were also sent to Tod & Company by Smith, Secretary of the Union Loan & Trust Company, "*agreeable to a request of A. S. Garretson*," on November 30, 1891, as collateral to the temporary loan made to Garretson, December 1, 1891 (p. 666), and certificates Nos. 40 for 178 shares, and 47 and 48 for 500 shares each, were sent by Garretson to Tod & Company on December 9, 1892, while Nos. 44 and 45 for 500 shares each, were sent by E. R. Smith, secretary, to Tod & Company, January 16, 1893, as collateral to the $1,500,000 loan (p. 652).

This stock was a part of the property of the Railroad Syndicate and Garretson testified that it belonged to James E. Booge, one of the original members, who was the only person besides the other members of the syndicate who had claimed any interest in it; that at the time Booge failed, the stock was standing in *his* name, and the remaining parties interested in the railroad property requested Booge to surrender that stock,

by having the old certificates surrendered and canceled and new certificates issued, and for him to step out of the Railroad Company and the railroad interest; he declined to do this, but consented that the stock should be put out of his name and held by some person in trust (p. 789); that at the time of Booge's failure there were no notes furnished by him for the Railroad Syndicate outstanding (p. 776).

It therefore appears that the Union Loan & Trust Company can assert no greater interest in or to the stock represented by these securities than to any of the other stock, and that the use of the word "trustee" after Garretson's name was not intended to give notice of any rights of the Trust Company.

V.

BUT ASSUMING THAT TOD & CO. HAD SUCH NOTICE AS SHOULD HAVE PUT THEM ON INQUIRY AS TO GARRETSON'S RIGHT TO DEAL WITH THE SECURITIES, IT IS APPARENT THAT IF THEY HAD MADE INQUIRY OF THE UNION LOAN AND TRUST COMPANY, SUCH INQUIRY WOULD HAVE ELICITED NO FACT TENDING TO IMPEACH GARRETSON'S APPARENT TITLE AND RIGHT TO PLEDGE.

There is no duty to inquire if the inquiry would not lead to a discovery of facts changing the rights of the parties.

Lea v. *Copper Co.*, 21 How., 493.
Wilson v. *Wall*, 6 Wall., 83.
Railroad Co. v. *Sprague*, 103 U. S., 756.

When inquiry becomes a duty there is notice only of the facts which inquiry will disclose.

Brush v. *Ware*, 15 Pet., 92.

Inquiry in this case would have elicited the fact that the Union Loan and Trust Company was for-

bidden by its charter to loan on railroad securities; that no authority had been conferred by the Board of Directors upon any officer to make any loan to any person upon a pledge of the securities in question; that there was no entry in any book in any manner referring to the securities; that none of them had ever stood in the name of the Trust Co.; that for four years Garretson had been accustomed to deal with them by sale or pledge at will with the full knowledge and consent of the manager of the Trust Company. The information they would have elicited from Smith is shown by what he did.

If therefore the defendants should be charged with the duty of making inquiry, whatever they would have naturally discovered in making the investigation can be now invoked to establish the implied authority of Smith and Garretson to deal with the securities as they did.

See *Hanover Bank* v. *American Dock & Trust Co.*, 148 N. Y., 612-622.
Fifth Natl. Bank *v.* Navassa Phosphate Co., 119 N. Y., 256.

VI.

THE TRANSACTION BETWEEN TOD & CO., THE SYNDICATE AND THE BRIDGE COMPANY, WAS NOT OUT OF "THE USUAL COURSE OF BUSINESS" SO AS TO PREVENT APPELLEES FROM MAINTAINING THEIR STATUS AS BONA FIDE HOLDERS FOR VALUE.

THE MEMBERS OF THE SYNDICATE IN ENTERING INTO THE CONTRACTS WERE NOT ACTING AS FIDUCIARIES. THEY OWNED THE BRIDGE COMPANY AND ALL OF ITS BONDS AND STOCK. IN MAKING THE CONTRACT IN ITS NAME THEY REPRESENTED THEMSELVES. IT IS AN ABSURDITY TO SAY THAT SUCH CONTRACT WAS IN FRAUD OF THE RIGHTS OF THE BRIDGE COMPANY AND ITS STOCKHOLDERS.

It is believed that the foregoing summary of the evidence is sufficient to show that the allegations in

paragraph XXX. of the amended petition are not proven, but that even if they were, the facts alleged are insufficient either to establish a prior lien upon the securities in favor of the Union Loan and Trust Company, or to charge the defendants with notice of such alleged lien.

For if it were true that the officers of the Manhattan Trust Company falsely represented to Garretson the condition of the Wyoming Pacific Improvement Company, thereby leading him to make a purchase which he could not afford, and which involved him in further advances and led him to pledge securities which he should have left in the Union Loan and Trust Company, and which ultimately resulted in the ruin of the Syndicate and the Trust Company, still the appellant has utterly failed to show that in any of his dealing, either with the Manhattan Trust Company or with J. Kennedy Tod & Co., the Union Loan and Trust Company asserted any interest or right in the securities, or that any notice or knowledge or intimation of any such alleged interest was given.

The appellants, however, argue that the form in which the loan of $1,500,000 was made was not "in due course of business," and not "in good faith," under the law merchant; and Judge Shiras, while establishing by his decree the rights of the respondents as holders of the collateral in controversy as security for the loan of $1,500,000 with interest, in his opinion *said:*

"The evidence shows that these notes were not issued by the Bridge "Company in furtherance of its business or for a consideration moving "to it, and it affirmatively appears that the persons occupying the posi- "tion of directors of the Bridge Company, when ostensibly authorizing "the purchase of the railroad stock and bonds, and the issuance of $1,- "500,000 of the promissory notes therefor, were not, in fact, acting on "behalf of the Bridge Company, but were obeying the dictation of the "Syndicate and J. Kennedy Tod & Co., and were in truth acting in "fraud of the rights of the Bridge Company and its stockholders"—*who, it will be observed, were this very syndicate at whose dictation they acted.*

"In fact the use that was made of the Bridge Company's name as "maker of the notes in question was clearly unauthorized and fraudulent,

"and the formal execution of the notes in its name and of the contract of "December 31, 1892, with the Syndicate did not create any binding "obligation on the company in favor of the other parties to the transac- "tion or those holding under them with knowledge of the facts" (Record, p. 395).

The practical *effect* given by the learned Judge to these views was to hold that the transaction must be considered as a loan of $1,500,000 to the syndicate upon the pledge of the bonds and stock as security, but that the junior lien of the Union Loan and Trust Company had not been divested by the auction sale (pp. 396 7).

In other words, the Court recognized the compelling equities of those who had advanced a million and a half of dollars upon the pledge of securities in negotiable form; but in casting about for a ground upon which to give petitioners a right to redeem the securities upon payment of the amount of the prior advances made upon them, hit upon this idea.

We take issue with the learned Judge both upon his facts and his law. The summary of the evidence given above (pp. 33 to 38) shows the circumstances which made the Bridge Company not only *a* proper party, but *the only* proper party to make the loan.

The amended petition alleges that the Bridge Company was incorporated for the purpose of connecting the Sioux City, O'Neill and Western Railway with the Sioux City and Northern, and of giving the former a terminus in Sioux City (p. 143). The advantages of this bridge and its relations to the properties are succinctly stated by the petitioners' counsel in the circular letter he addressed to the creditors of the Union Loan and Trust Co. on September 1, 1893 (see Record, pp. 1048–9). It will also be recalled that all of the stock of the Bridge Company belonged to the syndicate and had been pledged to Manhattan Trust Co. as additional security under the mortgage of the Sioux City, O'Neill and

$500,000–$600,000 expended on it.

Western Railway, all of the bonds secured whereby were to be pledged under the $1,500,000 loan. That the only lien upon the property of the Bridge Co. was a mortgage to Manhattan Trust Co. to secure an issue of bonds. That while $500,000 of these bonds had been certified by the Trustee, there is no evidence to show that they had ever been issued, and no bondholder appears to attack the transaction.

Messrs. J. Kennedy Tod & Co. had therefore the right to treat with Garretson and his associates as the owners of the Bridge Company as well as of the two railroad companies, and in making a loan, the purpose of which was to furnish them with $500,000 in addition to that already loaned, *to be used in furtherance of the bridge construction*, in which all the companies were interested, to consider and agree with them upon the particular corporation of the three concerned, which in view of all circumstances should become the borrower.

To say that these stockholders committed a fraud upon themselves which entitles third parties to set aside the transaction as legally void or voidable, is an obvious absurdity.

In *McCracken* v. *Robinson*, 57 Fed. Rep., 375, Circuit Court of Appeals, Second Circuit, the suit was brought to recover of defendants a share of the profits made in building a railroad for the Toledo, &c., Railway Co. The nominal plaintiff really represented four persons who were promoters of an enterprise for building a railroad from Muskegon to Ashley, in Michigan. They organized the railway company, subscribed for its stock, and made themselves and their friends directors.

They then made a contract in the name of the railway company with defendants to build the railroad, in consideration of the issue to defendants of all its stock and first mortgage bonds. Contemporaneously with said contract the promoters caused a separate agreement to be executed between defend-

ants and plaintiff, by which defendants agreed that if the construction contract was carried out, plaintiff should have one-half the net profits realized from the proceeds of the sale of the stock and bonds after reimbursing themselves for the cost of constructing and equipping the railroad.

This contract was modified by the plaintiffs' agreement to take and the defendants to pay $150,000 in full payment and discharge. In an action to recover this sum the defense was "that because the pro-"moters were directors of the railroad company at "the time the contracts for the building of the road "and the division of the profits were made, the "latter contract was illegal and against public "policy, and did not afford a good consideration for "the subsequent promise upon which the action "was brought."

But the Court, per Wallace, *C. J.*, said:

"We fail to see how the doctrine which is invoked has any application to the facts of the present case. Treating the two contracts as one transaction, conceived for the purpose of enabling the promoters to make a profit out of the construction of the railroad, we fail to see how the public or third persons were to be injuriously affected or could have any just reason to complain. *The promoters were not acting as fiduciaries.* * * * *When they entered into the contracts they owned the corporation and all its stock and represented only themselves.* While directors in name, they were principals in fact. The corporate organization was the machinery which they had brought into existence for carrying out the enterprise. * * * *If it was an improvident enterprise they were the only losers. If it was calculated to defraud anybody they were the only possible victims.* A quite similar state of facts was considered in the case of Barr *v.* Railroad Co., 125 N. Y., 263, and the Court used the following language:

> " ' All the stock and bonds were issued in payment for the construction of the railroad, and were taken by a syndicate of persons who assumed the contract for the work. It is true that the syndicate was made up of members of the board of directors, *but as the members of the syndicate were practically the company, and composed the whole number of stockholders, there was no one to object*, and the manner in which they chose to divide up their interests in the proprietorship of the corporation and to represent them in shares concerned only themselves. No principle of law forbade the company agreeing to pay for the construction of its railroad in the way or in the amounts it did. If the company's directors were interested in the work and profits of construction, and evaded a direct contract *through the form or device of an intermediary contractor, that was a matter for the company or its stockholders to take hold of.* But the stockholders and the members of the syndicate were the same persons, and however wrong the transaction might be if other persons were concerned, here no injury was effected to any one interested in the corporation.'

"The defendants by confounding names with things and form with substance have built up a theory to shelter themselves from performing their own part of the contract which is as unsound as their own conduct is dishonest."

The same principle was involved in the case of *Central Trust Co.* vs. *Bridges*, 57 Fed. Rep , 753 (C. C. of Ap., 6th Circ.), where the Court held, as stated in the head note:

"While construction contracts made by a dominating stockholder with a railway company for his own benefit are looked upon with suspicion, and frequently condemned by the Court when drawn in question by other stockholders, bondholders, or the corporation itself, *yet their legal existence cannot be*

questioned by third persons who are not injured thereby."

See also *Wright* vs. *Railroad Co*, 117 U. S., 72.
Union Pacific Ry. Co. vs. *C. R. I. & P. Ry. Co.*, 51 Fed. Rep., 309.
Tod vs. *Kentucky Union Land Co.*, 57 Fed. Rep., 47.

There is no question in the case of the rights of subsequent stockholders purchasing in ignorance of the debt; the matter stands entirely upon the contention that the holders of the stock perpetrated a fraud upon themselves.

The only explanation that can be given of Judge Shiras' views on this point is that in considering the bewildering mass of matter he overlooked the fact that the parties to the transaction owned the entire stock of the company.

But, as he states in his opinion, the circumstance that these notes were executed by the Bridge Company instead of Garretson, is utterly irrelevant (at least, as to any question except usury, which neither the Judge nor appellant discusses in that connection). The notes were endorsed by Garretson, and the pledge was as effective to protect the endorsement as to protect the face of the note.

The evidence clearly shows that instead of being planned with intent to defraud or deceive anybody, the transaction took the form shown by the contracts in evidence, as the means devised by defendants, under the advice of counsel, and with the full concurrence of the members of the syndicate, to secure themselves and those to whom they might sell the notes, by a valid and unimpeachable pledge of securities and notes; and that in reliance upon the validity of these contracts they actually advanced $1,500,000.

A legal presumption of fraud will not be imputed to such a transaction, nor as a matter of fact does it seem in the slightest degree reasonable that

lenders, making an outlay of that amount, under advice of legal counsel, would deliberately plan a scheme whereby their own security would be defeated. It must be presumed that they acted in good faith, and with the intent to procure a valid contract for their own security. Mere denunciation will not impugn their acts. That they acted with good intent is clearly established by the evidence.

The appellant quotes in his brief on the law, page 24, from the second article of the Bridge Company's charter, by which, among other things, there is conferred upon it power to "construct, own and "operate railroads and railroad tracks elsewhere, "and to have all the powers of railroad corpora- "tions, and with power to own, buy, lease any and "all real estate or personal property that it may "determine and desire, and with power to issue its "stock, and its bonds or other evidences of in- "debtedness, and to secure the same by mortgage "or deed of trust, or any or all of its property, "franchises, rights and immunities * * * and "shall have all the powers given by law to corpora- "tions for pecuniary profit, and all power necessary "to carry into effect the purposes of this corpora- "tion," and upon that charter claims that the notes were *ultra vires*. It is not easy to comprehend his argument on that point. The language of the charter certainly indicates that this Bridge Company had the power to purchase the stocks and bonds for which it gave its notes to Garretson. The Supreme Court of Iowa has given the broadest construction to the 6th paragraph of Section 1059 of the Code, which enumerates the following as among the powers of a corporation, namely: "To make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy" (see Thompson *v.* Lambert, 41 Iowa, 239, and McClain's Code of Iowa and supplements).

Section 1061, cited by appellant, limiting the indebtedness contracted in excess of the limit, has been construed by the Supreme Court of Iowa not to

afford a defense to a corporation which does exceed such limit, at least to the extent of the consideration received (see Humphrey *v.* Patrons, 50 Iowa, 607, and cases cited *supra*, p. 38). The appellant ignores the fact that this Bridge Company received any consideration for these notes, and that had it paid the notes it would have acquired all of the securities in dispute.

In *Garrett* vs. *Burlington Plow Company*, 70 Iowa, 697, it was held that a debt of a corporation beyond the limit of its charter is not invalid, *even where the debt is due to a director who permitted, by his participation in the corporate management, the accumulation of the debt beyond the allowed limit, and even though when the corporation is insolvent he took a mortgage as security.*

See also *Warfield* vs. *Marshall County Canning Co.*, 72 *Iowa*, 666.

In *Nat. Bank* vs. *Matthews*, 98 *U. S.*, 621, the Supreme Court of the United States having to interpret the effect upon real estate security taken by a National Bank, of those provisions of the Revised Statutes of the United States prohibiting a loan on real estate by a National Bank, reviews the principal authorities on statutory prohibitions of corporate acts, and says (Swayne, *J.*): "The statute does not "declare such a security void. It is silent upon the "subject. If Congress so meant, it would have "been easy to say so; and it is hardly to be believed "that this would not have been done, instead of "leaving the question to be settled by the uncertain "result of litigation and judicial decision" (p. 627), and again, "The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress. That has always been the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application" (p 629).

The Bridge Company had the power to acquire

property by purchase, and if it were such property as it could not lawfully purchase under its charter, the title, nevertheless, passed to it, and it lay only with parties injured to object.

Whitney Arms Co. vs. *Barlow*, 63 N. Y., 62.

27 *Am. & Eng. Enc. of Law*, 363, and cases cited.

There is a plain distinction between *illegality* and *ultra vires*. In *Bissell* vs. *Michigan Southern R. Co.*, 22 N. Y., 258, in the course of an argument on the powers and capacity of corporations, which has been much quoted, Comstock, *C. J.*, says at page 269: "The words *ultra vires* and *illegality* represent totally different and distinct ideas. It is true that a contract may have both of these defects, but it may also have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription made by authority of the Board of Directors, and under the corporate seal, for the building of a church or college or almshouse, would be clearly *ultra vires*, but it would not be *illegal*. If every corporator should expressly assent to such an application of the funds, it would be *ultra vires, but no wrong would be committed and no public interest violated*. So a manufacturing corporation may purchase ground for a schoolhouse, or a place of worship, for the intellectual, religious and moral improvement of its operatives. It may buy tracts and books of instruction for distribution among them. Such dealings are outside of the charter, but, so far from being illegal or wrong, they are in themselves benevolent and praiseworthy. So a church corporation may deal in exchange. This, although *ultra vires*, is not illegal, because dealing in exchange is, in itself, a lawful business, and there is no State policy in restraint of that business.

In *Kent* v. *Quicksilver Mining Co.*, 78 N. Y., 159,

Folger, *J.*, goes so far as to say that "even an un-
" conscionable arrangement will not be disturbed,
" where there has been ratification of it with knowl-
" edge of all its bearings, after time has been had
" for consideration."

In *Matter of McGraw*, 111 N. Y., 166, Peckham, *J.*, in summarizing the case, on this subject, states that, as a general rule, the plea of *ultra vires*, whether interposed for or against a corporation, will not prevail when it will not advance justice, but will accomplish a legal wrong.

We contend that the doctrine of *ultra vires* is invoked here by the appellant for the purpose of accomplishing a legal wrong, to wit, the declaration that a contract actually executed by both parties, with all interested parties acquiescing at the time, is void, and of no effect, so that persons who in nowise relied upon the restricted power of the corporation and were in nowise interested therein, and who took no pains to ascertain the true situation, may benefit, to the injury of persons who relied upon the validity of the contract and parted with money upon the faith thereof.

See

Holmes v. *Willard*, 125 N. Y., pp. 75–80.

Wood v. *Corry Water Works Co.*, 44 Fed. Rep., 146.

Campbell vs. *Argenta Gold and Silver Mining Co.*, 51 *Fed. Rep.*, 1.

The evidence introduced to show that Coombes was not secretary of the Bridge Company, and that due notice was not given of the meeting at which the contract with the syndicate was authorized, is quite immaterial. The evidence and the records showed that they met and took official action; the presumption, therefore, follows that they were rightfully in session, and if notice was necessary, that it was given.

Hardin vs. *R. R. Co.*, 78 Iowa, 726.

This presumption was not rebutted.

Moreover the Bridge Company received actual value for the notes. They were given in payment of certain securities which have since been sold for $1,000,000, and for the remaining unpaid indebtedness of $500,000, the Bridge Company received, on the evidence, at least $200,000, and the balance was received by the Union Loan and Trust Company. Neither it nor its assignee is therefore in a position to complain of the alleged fraud on the Bridge Company.

VII.

THE ALLEGATIONS OF USURY IN THE LOAN WERE NOT ESTABLISHED. IF THEY WERE, APPELLANT IS IN NO POSITION TO BENEFIT THEREBY, NOT HAVING TENDERED OR OFFERED TO PAY THE AMOUNTS ACTUALLY ADVANCED.

It is *suggested*, rather than argued, that the notes having been, as contended, given for a usurious consideration, the respondents cannot be the *bona fide* holders thereof. The usury is denied, as will be presently shown. But the alleged usury consists in the consideration for the sale of the notes by Garretson, the endorser, to the Union Debenture Company. As between Garretson and the Pacific Short Line Bridge Company, the consideration for the notes is the sale of the securities, and there can be no question of usury. The notes having a valid inception, Garretson could sell them for whatever price he pleased without violating the statute.

1 Daniels on Negot. Insts. (4th Ed.), § 750.

Moreover the Pacific Short Line Bridge Company, a corporation, by the laws of New York cannot plead

usury, and therefore Garretson, the endorser, is within the same prohibition.

Id., § 674 and cases cited.

The appellant goes further and claims that the entire transaction is usurious and therefore void; that as a junior lienor he has a right to show such illegality, and that therefore he is entitled to a decree that the securities be delivered over to him without compensation.

This contention was not advanced in the amended petition upon which issue was joined, evidence taken and trial had, but is contained in the Second Amended Petition, leave to file which was granted in the final decree (pp. 265-6).

It was objected to the filing of these amendments that by the pleas of usury contained therein the petitioner sought to introduce a wholly new and independent basis for the relief sought by his original petition, by setting up that the loan to secure which the securities in controversy were pledged to Tod & Co. was made contrary to the New York statutes of usury, and therefore void.

On this point, Shiras, *J.*, said: "It is urged on be-
" half of the intervenor that the loan of $1,500,000
" was rendered usurious by the payment of a com-
" mission of three and one half per cent. to the De-
" benture Company for floating this loan. It is not
" necessary to consider at length the legal questions
" discussed by counsel in connection with this mat-
" ter of usury. Even if it were open to the inter-
" venor to plead usury in a contract for the loan of
" money, to which contract the Trust Company was
" not a party in any form, nevertheless, when the
" aid of a court of equity is invoked, equity must
" be done and that requires the payment of the
" sum advanced with interest (Tiffany *v.* Boat-
" men's Institution, 18 Wall., 575: Pomeroy's Equity
" Jurisprudence, Section 937." (Record, p. 397).

The appellant assigned for error the failure of the Court to award him relief on the basis of illegality

in the contract owing to usury (see his 17th and 20th assignments). Aside from other considerations, therefore, we contend that the Circuit Court erred in permitting him to *plead* usury.

It introduced at a late date in the progress of the cause a wholly new claim. *The plea of usury is not favored, especially in courts of equity, and if not properly raised, no indulgence should be extended to the party seeking to avail of it* (*Hotel Co.* vs. *Wade*, 97 U. S., 13).

The allegations in that behalf in the second amended petition are demurrable, *because they fail to tender or offer to pay the principal and interest lawfully due upon the notes, or anything tantamount thereto, and pray an adjudication that the notes be declared void for usury, and that the collateral be surrendered without condition.*

The distinction is drawn in the cases, between the position occupied by a *defendant*, against whom a usurious agreement is sought to be enforced, and the position of the *borrower*, or a person claiming title to securities which are pledged for an alleged usurious contract, coming into a court of equity invoking its *affirmative* aid to recover back the securities or cancel the agreement. In the latter case it is held that the complainant, to entitle himself to any relief in equity, must do equity, *by paying the amount actually advanced upon the alleged usurious agreement, with lawful interest thereon.* It was accordingly held in New York, that one who holds a mortgage on real estate, subject to a lien of a prior judgment, cannot maintain a bill to set aside such judgment on the ground that it was confessed for a usurious debt, without offering to pay the sums equitably due upon it.

Fanning vs. *Dunham*, 5 John. Chancery, 122.

Dey vs. *Dunham*, 2 *Id.*, 182.

Spain vs. *Hamilton's Administrators*, 1 Wal., 604-624.

See also

Reford vs. *Widger*, 2 N. Y., 131.
Schermerhorn vs. *Tallman*, 14 N. Y., 93.
Beecher vs. *Ackerman*, 1 Robertson, 30.
Brown vs. *Swan*, 10 Peters, 497.
Stanley vs. *Gadsby*, 10 Pet., 521.
Welch vs. *Wadsworth*, 30 Conn., 149, 79 Am. Dec., 236.

In *Stanley* v. *Gadsby*, the Court says: "This then is substantially an application for relief from usury, and the consequence of granting the injunction would be relief upon terms at variance with the rule of equity so fully recognized at this term of the Court, in the case of *Brown* v. *Swan et al.*, 10 Pet., 497; that he who seeks the aid of equity, to be relieved from usury, must do equity by paying the principal and legal interest upon the money borrowed. *The complainant does not offer to do so in his bill. This is essential to every such application in a court of equity, first, to give the court jurisdiction*, and to enable the Chancellor, if he thinks proper so to do, to require the payment of principal and interest *before the hearing of the cause.* The relief sought in such cases is an exemption from the illegal usury. The whole inquiry on the hearing is to establish that fact, and to give relief to that extent. *Whenever then a complainant does not comply with the rule, by averring in his bill his readiness or willingness to pay principal and interest, he has no standing in a court of equity.*

Where defendant in chancery to establish the usury relied on, was obliged to ask leave after proofs were closed to examine a witness and amend his answer, THE CHANCELLOR MADE IT A CONDITION THAT HE SHOULD FIRST PAY PRINCIPAL AND LEGAL INTEREST.

Beach v. *Fulton*, 3 Wend., 573.

And so rigidly has this doctrine been enforced that although the Legislature of New York, in 1837, passed an act (Chapt. 430, Sec. 47) which provided:

> "Whenever *any borrower* of money, goods, "or things in action, shall file a bill in chan- "cery for relief or discovery, or both, against "any violation of the provisions of the said "title (referring to the Usury law) or of this "Act, it shall not be necessary for him to pay "or offer to pay any interest or principal on "the sum or thing loaned. Nor shall any "Court of Chancery require or compel the "payment or deposit of the principal sum or "interest, or any portion thereof, as a condi- "tion of granting relief, or compelling or "discovering to the borrower in any case "usurious loans forbidden by said title or by "this Act."
>
> N. Y. Rev. Statutes, Banks Bros., 7th Ed., p. 2255.

Yet such statute has been uniformly construed to be applicable only to cases where the *borrower himself* comes into chancery, and it has been held that it did not apply to *purchasers* from the borrower, nor to his *assignees* in bankruptcy.

Wheelock vs. *Lee*, 64 N. Y., 242.

Nor to a person taking title to land, or other property, mortgaged or pledged as security for the alleged usurious debt.

Buckingham vs. *Corning*, 91 N. Y., 545.

Nor to an endorser or guarantor of the alleged usurious paper.

Allerton vs. *Belden*, 49 N. Y., 373.

See opinion of Rapallo, *J*, in last case cited.

See also *In re Hoole*, 3 Fed. Rep., 496, District Ct., S. D. N. Y.

This statute, moreover, does not apply outside of the limits of New York, and cannot bind a Federal court of equity, and when even *the borrower himself* comes into a Federal court outside of the State of New York, claiming title to securities which are pledged for an alleged usurious contract, he must pay, or offer to pay, the amount actually advanced upon the securities, with lawful interest, before he can be heard.

Mathews vs. *Warner*, 6 Fed. Rep., 461, Lowell, *J.*, C. C., D. Mass.

See *Norman* vs. *Pepper* (24 Fed. Rep., 403), per Caldwell, *J.*:

> "Assuming, but not deciding, that the "note and mortgage are usurious, the plain- "tiffs cannot have the relief they seek, viz., "a perpetual injunction against its foreclos- "ure by notice and sale, *without first paying "or tendering the amount of the debt, and "legal interest.*"

Aside from such fundamental defect, the appellant is not entitled to raise the objection that the loan to Garretson was usurious.

VIII.

IT IS ESTABLISHED BY MANY CASES THAT THE DEFENSE OF USURY IS PERSONAL TO THE BORROWER AND THOSE IN PRIVITY WITH OR CLAIMING UNDER HIM. THE APPELLANT CANNOT THEREFORE BE HEARD TO ASSERT THAT THE LOAN IN QUESTION IS USURIOUS.

I. Pomeroy's Eq. Jur., Secs. 391, Vol. II., 937.

Culver *vs.* Wilbern, 48 Iowa, 26.

DeWolf *v.* Johnson, 10 Wheat., 367.

Bank *v.* Warehouse Co., 49 N. Y., 635.

Chapuis *v.* Mathot, 91 Hun (N. Y.), 565.

The appellant contends that he does not stand in Garretson's shoes (Brief on Law, p. 31), nor—apparently—in those of the Union Loan & Trust Company. If that claim be well founded, he cannot be heard to allege usury.

IX.

NEITHER OF THE LOANS WAS USURIOUS.

While the Revised Statutes of New York forbid the taking of any greater sum or value than six per cent. for the loan or forbearance of any money, and provides "that all bonds, bills, notes * * * "whereby there shall be reserved or taken or se- "cured, or agreed to be reserved or taken, any "greater sum or value shall be void" (N. Y. Rev. Stats., Banks Bros.' 7th Ed., p. 2253), it is also enacted by the Laws of 1850, Chapter 172 (*Id.*, p. 2256), that

> "NO CORPORATION SHALL HEREAFTER INTER- "POSE THE DEFENSE OF USURY IN ANY ACTION."

And it has been uniformly held that this act has repealed the Statutes of Usury, where a corporation is a borrower.

> See *Belmont Branch Bank* vs. *Hoge*, 35 N. Y., 65.

And that neither the corporation nor the endorser of its paper can plead the statute.

> *First Natl. Bank* vs. *Morris*, 1st Hun, 680.
>
> *Union Natl. Bank* vs. *Wheeler*, 60 N. Y., 612; affirmed 96 U. S., 268.
>
> *Stewart* vs. *Bramhall*, 74 N. Y., 85.
>
> *Junction R. R.* vs. *Bank*, 12 Wall., 226.

So that neither the Pacific Short Line Bridge Company nor A. S. Garretson, the endorser of its notes, could be heard to allege that the notes of the Pacific Short Line Bridge Company secured by the agreement of December 31, 1892, were usurious, nor, of course, can the Union Loan and Trust Company, or its assignee, whose only claim to the securities is based upon an alleged pledge from Garretson.

Neither the Bridge Company nor Garretson is raising the question of usury. Garretson, indeed, expressly repudiates it, testifying: "In this connection let me state, inasmuch as I am appearing "without counsel, that, voluntarily, I would raise "no questions whatever touching any transaction "which I may have had with business people touching the rates of interest or commissions or other "considerations involved."

That the borrower may waive the objection of usury is well settled.

Chapais v. *Mathot*, 91 Hun, N. Y., 565.
Thomas v. *Coffin*, 23 U. S. Ap., 653.

The Court of Appeals of New York has uniformly held that the presumption is against a violation of the usury law, and the *facts* alleged to show usury must be proven.

White vs. *Benjamin*, 138 N. Y., 623.
Stillman vs. *Northrup*, 109 N. Y., 473.
Baldwin vs. *Doying*, 114 N. Y., 452.
Brown vs. *Champlin*, 66 N. Y., 214.
Van Wyck vs. *Waters*, 81 N. Y., 352.

Elaborate inquiries were made on behalf of the appellant, and testimony offered to show that the transaction in question took the form of a loan to the Pacific Short Line Bridge Company as a mere device to avoid the statutes of usury. Whatever doubts there might be on the testimony on that point, as between the conflicting evidence of Garretson and of the Messrs. Tod, the telegram sent by

the attorneys for Tod & Company to Garretson, on December 21, 1892, while they were engaged in the preparation of the loan agreement, stating that on examination they found that the railroad company could not lawfully make the notes, and that Tod had suggested that the bridge company do it, affords the most satisfactory corroboration of Mr. Tod's testimony that the loan as originally arranged was to be to the Sioux City, O'Neill and Western Railway Company, and that because of certain provisions of the Nebraska statute the bridge company was substituted.

It may be freely conceded that the original agreement, to make the loan to the Sioux City, O'Neill and Western Railway was somewhat controlled by the statute above cited abolishing the usury laws where corporations are concerned; and when the objections to that corporation arising out of the provisions of the Nebraska statutes were considered, it was most natural to substitute another corporation —the bridge company—for the railroad company. As Garretson and his associates were the legal owners of the stock in all of these corporations, and as the purpose of the loan was to take up the prior loan with which the properties had been acquired, and to complete the construction of the bridge which was to connect all the properties, the transaction was naturally and properly put into the shape of a corporate obligation. As Mr. Tod testified, aside from any other question, the obligations of a corporation are more readily disposed of than those of an individual. One reason for this is undoubtedly the fact that no question of invalidity by reason of violation of the statute of interest can arise under the laws of New York with regard to the obligations of a corporation.

But in no respect did the transaction violate the statutes of interest. The *notes* stipulated for the payment of interest at the rate of 6 per cent. only. The commission of 3½ per cent. which is alleged to constitute usury was a commission agreed to be paid

by *Garretson*, the endorser of the notes, to the *Union Debenture Company*, for its services in procuring the sale for him of the notes, and immediate advances upon them to the amounts stipulated in the agreement between those parties, and the options conferred upon the Union Debenture Company were matters in the same agreement. There was no stipulation between Garretson and the Bridge Company whereby the Bridge Company agreed that its notes should bear a greater rate of interest or carry any additional privilege or advantage beyond the 6 per cent. rate of interest; and the purchasers of the notes obtained only promises to repay the amount thereof, with interest at 6 per cent. per annum.

The *purpose* of the parties is immaterial; it is the *actual contract* that the Courts inspect. If the contract itself was lawful, independent of the *motives* of the parties, it is lawful still (*Smith* vs. *Paton*, 31 N. Y., 66).

In *Dunham* vs. *Cudlip*, 94 N. Y., 129, it was held that the making of a mortgage with the understanding that, after it was made, it should be purchased for less than its face, could not make the purchase usurious *nor convert the contract of purchase into a loan of money.*

In *Smith* vs. *Cross*, 90 N. Y., 549, 553, the Court used this language:

"If A applies to B for the loan of money, B may refuse to loan, and say to A that he must procure a valid mortgage which he can buy at a discount, and he may suggest to A that he might sell his real estate to C and get a mortgage from C, and that he would then buy the mortgage at a discount. If A, in pursuance of the suggestion and scheme, actually sells his real estate to C, and takes a valid, legal mortgage from C, that mortgage has a valid inception and is subject to sale and traffic like any other chose in action. If that was the transaction be-

tween Wilson and Cross, then there was no usury in this mortgage, and the defense must fail on that ground."

In *Dunham* vs. *Cudlip*, 94 N. Y., the Court says, at page 135:

"No doubt the plaintiff wanted to get more for his money than simple interest. But he knew the statute of usury and did not intend to come within it. This was understood by the defendant. No doubt, also, there was then suggested a plan whereby he might keep outside of the statute and still obtain a return from the investment greater than the rate allowed by it. *There is no law against that.*"

And in *Union Dime Savings Bank* v. *Wilmot*, 94 N. Y., the Court says, at pages 226-7:

"The following facts appear from the undisputed "evidence: The mortgage was assigned to the plain- "tiff at a discount from its face of 7 per cent. An "application was made to it for a loan, and it re- "fused to loan money, but offered to purchase a "purchase money mortgage if one could be made "and brought to it. Subsequently, this mortgage, "reciting that it was given for purchase money, "was presented to it, and it was represented at the "time, orally, to be a purchase money mortgage. "* * * The plaintiff had the right to refuse to "loan the money in this case at 7 per cent., then "the legal rate, and to require that a valid purchase "money mortgage should be made, which it could "purchase at any rate of discount which could be "agreed upon."

A similar device to avoid the effect of the National Banking Act, which prohibits loans on real property, was approved as lawful in *First Nat. Bank* vs. *Haire*, 36 Iowa, 443, and by the Supreme Court of the United States in *National Bank* vs. *Matthews*, 98 U. S., 621.

It therefore sufficiently appears that the Bridge Company's notes were *valid* notes, secured by a *legal pledge* of the securities in controversy.

But usury can only be predicated of an agreement for excessive interest on the part of the *holder* of the note.

Payment to a broker to procure the sale or discount of the note, of an agreed sum for his services, does not make the note usurious.

Lincoln Nat. Bank v. *Kirk*, 18 *Misc.* (N. Y.), 45.

The purchase of a promissory note from the transferee of the payee for a sum more than 6 per cent. less than its face value is not usury.

Chase Bank vs. *Faurot*, 72 Hun (S. Ct. of N. Y.), 373.

Flour City Bank v. *Miller*, 4 App. Div. (N. Y.), 585.

And in general an agreement valid in its inception cannot be invalidated by subsequent agreements concerning it.

Emmons vs. *Barnes*, 55 N. Y., 643.

Farmers & Mechanics' Bank v. *Parker*, 37 N. Y., 148.

Bullard vs. *Raynor*, 30 N. Y., 197.

The appellant further contends that these $1,500,000 of notes were used *pro tanto* to take up a prior loan of $1,000,000 of A. S. Garretson, which is also alleged to have been usurious, and that an alleged usury in the $1,000,000 loan thus taints this $1,500,000 loan. The following authorities hold, however, that where a new loan of a new party is made to take up a usurious loan, *the new loan is not tainted with usury:*

Call v. *Palmer*, 116 U. S., 98, 103.

Wendelbone v. *Parly*, 18 Iowa, 546.

Mason v. *Searles*, 56 Iowa, 532.

Cottrell v. *Southwick*, 71 Iowa, 50.

Bank v. *Hottenstein*, 89 Pa. St., 328.

Drake v. *Chandler*, 18 Grat., 909; 98 Am. Dec., 762.

In *Buchanan* v. *Stovers Nat. Bk.*, 55 F. Rep., 223 (C. C. of Ap., 6th Cir., Apl., '93), it was held that a new note given to raise money with which to pay off a prior note, which had been given to obtain means whereby to prosecute an unlawful business, is not affected by the illegality of the first note.

But the notes given by A. S. Garretson under the previous agreement of October 1, 1891, are directly within the terms of the New York Statute of 1882, Chapter 237, which provides as follows:

"IN ANY CASE HEREAFTER IN WHICH ADVANCES OF "MONEY, REPAYABLE ON DEMAND, TO AN AMOUNT NOT "LESS THAN $5,000 ARE MADE UPON WAREHOUSE RE- "CEIPTS, BILLS OF LADING, CERTIFICATES OF STOCK, "CERTIFICATES OF DEPOSIT, BILLS OF EXCHANGE, "BONDS OR OTHER NEGOTIABLE INSTRUMENTS "PLEDGED AS COLLATERAL SECURITY FOR SUCH RE- "PAYMENT, IT SHALL BE LAWFUL TO RECEIVE OR TO "CONTRACT TO RECEIVE AND COLLECT AS COMPENSA- "TION FOR MAKING SUCH ADVANCES ANY SUM TO BE "AGREED UPON IN WRITING BY THE PARTIES TO SUCH "TRANSACTION."

SECTION 2. "ALL ACTS OR PARTS OF ACTS INCON- "SISTENT HEREWITH ARE HEREBY REPEALED."

The effect of this law was to remove from the operation of the usury laws all loans of money payable on demand where the amount loaned or advanced was not less than $5,000, and where shares of stock, bonds or other negotiable instruments were pledged as collateral security for repayment.

Hawley v. *Kountze*, 6 App. Div. (N. Y.), 217.

The appellant attempted to avoid the effect of this statute by endeavoring to show that at the time of making the $1,000,000 notes, which by their terms were payable *on demand*, there was an oral agreement between Garretson and Tod & Co. that

they should not be payable for fourteen or fifteen months.

This evidence was objected to and was not admissible.

1 *Greenleaf on Evidence*, Sec. 275.
Randolph on Commercial Paper, Secs. 120, 1820, 1898.

It is thoroughly well settled in the Federal courts *that parol evidence of an oral agreement alleged to have been made at the time of the written instrument, cannot be permitted to vary, qualify or contradict its terms in any particular* (citing 102 U. S., 658 61, and 104 U. S., 31). It is equally well settled that Federal courts are not bound by decisions of State courts allowing parol agreement to limit effect of a written contract, but will follow their own rule, as above stated (citing *Liverpool* v. *Phœnix*, 129 U. S., 433; *R. R.* v. *National*, 102 U. S., 31).

Van Vleet v. *Sledge*, 45 Fed. R., 749.

So parol evidence to prove that an instrument, which on face is a promissory note, was intended by the parties at the time to be only a memorandum. Held inadmissible.

Burns v. *Scott*, 117 U. S., 582.

The testimony offered on this point was clearly inadmissible, and although in the record in the omnibus way in which everything, proper or improper, admissible or inadmissible, goes into an equity cause, under a practice which provides for the taking of testimony without the restraining presence of a magistrate empowered to apply the rules of evidence to the examination, its effect must be considered by the Court in the light of settled rules of evidence. It is established beyond controversy that the notes of the $1,500,000 loan are, to a large amount, *held by parties other than those who held the notes of the $1,000,000*, and that all of the notes of both loans

were sold and transferred to different parties, and while Tod & Company retained a few of the notes of the $1,000,000, they hold none of the notes of the $1,500,000 loan. Evidence, therefore, of conversations or agreements between Garretson and Tod tending to vary the terms of the notes of the $1,000,000 loan, or the agreement securing the same, are clearly inadmissible as against the trustees under the $1,500,000 loan, or the holders of such notes.

The letters of Tod & Company which were offered to establish a change in the agreement (pp. 993-1007) could only be admissible on the theory of being an admission by the party against his interest; but the defendants here, being trustees, cannot, by admissions or statements, make evidence affecting or modifying the rights of their beneficiaries, the actual parties in interest. Nor, as a matter of fact, do the letters, even if admissible, sustain the contention. The letter of October 26, 1891, merely states: "We note that *you wish the loan to run* for "fourteen months to first December, 1892. Was it "not your intention to have it run for fifteen "months, say until 31st December, 1892?" Mr. Tod testified that when Garretson applied for the loan he told them he wanted it for that period of time. They told him, however, that they could not make it on those terms, but would make it as a demand loan, *and hoped that they would have no necessity to call it sooner than that date.* That they came under no obligation, however, directly or indirectly, to call the loan at any time (p. 1339), while Garretson's testimony on that point resulted on cross examination in the conclusion that while he expressed some disapproval at the loan being a demand loan, nothing developed in the discussion which caused him to have any fear as to the loan being called before December, 1892. He could not, however, say that it was not stated to him specifically at the time of signing the agreement that no agreement could be made with regard to the

time of calling the loan, but that it must take the form of a demand loan and he must rely on the good feeling and fair play of J. Kennedy Tod & Co. as to the time of calling the loan (762).

Moreover, the loan of 1891 was made directly by J. Kennedy Tod & Co., a private banking firm, and aside from any other question, even if clearly usurious, could be at most subject only to a forfeiture of the interest carried by the notes or agreed to be paid thereon, and such notes are perfectly valid to secure the principal of the loans.

The banking law of New York (Laws of 1882, Chap. 409, Banks Bros., 8th Ed., Vol. 2, p. 1529), provides:

> "SECTION 68. Every banking association organized and doing business under and by virtue of the laws of this State, and every private and individual banker, or bankers, doing business in this State, are hereby authorized to take, receive, reserve and charge on every loan or discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate of six per cent. per annum. * * * The knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid, shall be held and charged *a forfeiture of the entire interest* which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon." * * *

Section 69 declares the true intent and meaning of the last preceding section to be to place the private individual banks and the banking associations aforesaid on an equality in the particulars in said section referred to, with the national banks organized under the acts of Congress.

In *Perkins* v. *Smith*, 116 N. Y., 441, it was held that the words "private banker" in this statute applied to persons or firms engaged in the business of banking without any special privileges or authority by statute. J. Kennedy Tod & Co. are therefore directly within the provisions of the statute.

And these sections of the Act of 1882 are still in force, not having been repealed by the revised banking laws of 1892.

L. 1892, Ch. 689, §§
Hawley v. *Kountze*, 18 Misc. Rep., (N. Y.), 249.

X.

THE AUCTION SALE ON SEPTEMBER 26, 1893, CUT OFF ALL EQUITY OF REDEMPTION OF THE UNION LOAN AND TRUST COMPANY OR ITS ASSIGNEE IN THE SECURITIES.

The appellant failing to substantiate his contention that Messrs. Tod & Co. were not *bona fide* pledgees of the securities in question for value and without notice, next contends that the sale at auction and the purchase by the defendants as purchasing trustees did not confer any additional rights upon them.

This contention is based upon two considerations: (1) The claim that the loan transaction was a fraud upon the Bridge Company, and (2) that the auction sale was improvidently and harshly conducted, and in equity should not operate to divest any of appellant's rights.

The Circuit Court held that the transaction was not binding upon the Bridge Company, for the reasons above recited, that

" Brushing aside all connection of the Bridge Company with the trans-
" action, the fact remains that the Syndicate procured the loan of
" $1,500,000 by pledging the stock and bonds as security therefor, and
" the equity in the securities thus created is superior to that existing in
" favor of the Trust Company because accompanied by the possession of
" the bonds" (and stock) * * *; "that the Union Loan and Trust
" Company is in equity, as against the Syndicate, entitled to enforce the
" agreement that the securities belonging to the Syndicate should be ap-
" plied to the payment of the Syndicate notes endorsed by the Trust

" Company; that this right, however, is subordinate to the right and " equity created by the pledge of these securities to J. Kennedy Tod & " Co., as trustees, to secure the loan of $1,500,000; that the right of the " Trust Company in this respect is not other or greater than that of the " Syndicate " (p. 367).

But the agreement whereby the loan was made was not *oral;* the pledge of the securities was made to Tod & Co.—not by the Bridge Co., but by *Garretson,* the endorser of the notes, with the written consent of the other members of the syndicate *and* the Bridge Company. Eliminating the latter entirely, the fact remains that the securities were transferred to J. Kennedy Tod & Co., as trustees, by an indenture in writing dated December 31, 1892, executed with the full knowledge and consent of all the members of the syndicate, and with the knowledge and consent of the managing officer of the Union Loan and Trust Company.

This indenture provided (1) that in case of default in the payment of interest on any of the $1,500,000 of notes continued for thirty days the principal of all the notes might be declared due. (2) That in such event the trustee might sell the stock and bonds so pledged at public auction in New York in one lot or parcel or several lots and parcels as *they* might deem best, upon notice by advertising in newspapers in New York and Sioux City; that they might adjourn the sale without further notice; and that such sale " shall be a perpetual bar at law and in " equity against the party of the first part," Garretson, to whom, for the purposes of this loan, the remaining members of the syndicate had, by the contract of December 30, 1892, conveyed all their interest—" and all persons or corporations claiming or to " claim by, through or under him "—which would include the Union Loan and Trust Company, and all the holders of syndicate notes endorsed by it. Further, that any party appointed by the holders of two-thirds of the notes as a " purchasing trustee " might buy at such sale (*vide supra*).

Default did occur on July 1, 1893, and the prin-

cipal of all the notes was declared due on August 23, before the creditors of the Union Loan and Trust Company organized and about the time Mr. Coombes began his efforts in their behalf.

Notice of a sale of the pledged securities was advertised in New York and Sioux City for September 19, 1893. The sale was adjourned, at Mr. Coombes' request, until September 26, and notice of the adjournment advertised in New York and Sioux City, although not required by the trust agreement.

The securities were sold on said day at public auction, in one lot, and were purchased by "J. Kennedy Tod & Co," who had been appointed "purchasing trustees" by the holders of two thirds of the notes, for one million dollars – that being the only bid (*vide supra*, pp. 46, 47).

Jones on Chattel Mortgages (4th Ed.), S. 789 *et seq.*, and the authorities cited, show conclusively that a power of sale actually given and fairly and strictly exercised in good faith has the effect of extinguishing the equity of redemption, both of the mortgagor and of junior encumbrances.

That it is not a proper exercise of equitable interference, to grant a right of redemption after a fair and *bona fide* sale in strict conformity with a power, follows from the principles of the cases cited below:

In *Elliott* vs. *Wood* (45 N. Y., 71), an action to establish the title of the mortgagor to real property, sold under a power, Allen, *J.*, said (at p. 78): "The right of parties to regulate the terms of a power of sale of mortgaged premises by the mortgagee, by stipulation, is clearly recognized, and courts have never assumed to control this right, or to make new contracts for the parties, in the absence of fraud or some statutory regulation on the subject. Parties may contract for a private sale and without notice." And again, in concluding, (p. 80): "The power of sale here was in all its terms legal and valid, and such as the parties were competent to agree upon, and was faithfully and fairly executed after personal notice

to the mortgagor, and *the sale effectually foreclosed the equity of redemption of the plaintiff.*" The complaint was dismissed.

In *Richards* vs. *Holmes* (18 How., 143), on a bill by a subsequent encumbrancer to set aside a sale under a power to satisfy a prior encumbrance on land, the Court, by Curtis, *J.*, regarded the construction of the power as the important question, stating that it was competent for the parties to agree to a foreclosure by sale. The bill was dismissed.

In *Denny* vs. *Van Dusen* (27 Kans., 437), an action for damages, Brewer, *J.*, speaking of a power of sale, says: "The contract is valid; there is no stat-"ute forbidding it; it is not against public policy and "would oftentimes increase the value of the mort-"gaged property to the mortgagor as security with-"out in any manner prejudicing any substantial "rights. Why should not the owner of personal "property, who may sell absolutely or conditionally, "and impose such conditions as the parties may "agree upon or give it away, providing it be not done "in fraud of creditors, why should not such owner "be permitted to mortgage his property upon such "conditions as he sees fit? *Freedom in commercial "transactions is always to be encouraged, providing* "only that such freedom does not trespass upon any "statute, do any wrong to the public or work any "injustice to the parties. It would often be of great "value to the mortgagor if he could insert a valid "stipulation that the mortgaged property when "taken possession of by the mortgagee should be "sold in a certain market or at a certain time or "upon certain conditions. To deprive him of such "right would render his property less valuable for "the purpose of security and perhaps prevent him "from obtaining such a loan as his necessities re-"quire."

Of similar import are

Rose vs. *Page*, 82 Mich., 105.
Campbell vs. *Wheeler*, 69 Iowa, 588.
Wylder vs. *Crane*, 53 Ills., 490.

A decision frequently cited on this point is that of *Bryant* vs. *Carson River Lumbering Company*, 3 Nev., 313; 93 Am., Dec., 403, in which Lewis, *J.*, says: "The law authorizing the mortgagee to sell is, "in our opinion, so thoroughly settled that it cannot "admit of a question. Such being the right of the "mortgagee, it follows as a necessary consequence "that the purchaser from him obtains an absolute "legal title as complete, perfect and indefeasible as "can exist or be acquired by purchase; and a sale "upon due notice to the mortgagor, whether at public "or private sale, forecloses all equity of redemption "as completely as a decree of court. For a reason- "able time after the breach of the condition of the "mortgage, and whilst the property remains in the "possession of the mortgagee, the courts of equity "have uniformly, upon a proper application, allowed "a redemption by the mortgagor, but *after a sale* "*made upon due notice no such right exists, for the* "*purchaser acquires the absolute title.*"

The power of sale was actually exercised by the mortgagees, in strict conformity with the terms of the written agreement to which the syndicate had assented, and of which the Union Loan and Trust Company's representative officer had full knowledge, after full and complete notice to the intervenor and to the mortgagor, and in newspapers as stipulated in the written contract. The *appellant* must be treated as bound by the terms of that contract; and he *has been, by the decree, held to the observance of its terms, as regards amount, interest and interest rests.* The only logical conclusion is to hold him barred by the sale of any right of redemption he might otherwise have had (see *Richards* vs. *Holmes*, 18 *How.*, 143).

The sole reason which might exist for subjecting the purchaser to the intervenor's right of redemption is the alleged identity of the purchaser with the mortgagee.

There is ground for distinguishing the pledgee

from the purchaser, because the purchaser, in making the purchase, acted by special designation, as purchasing trustee, in conformity with the privilege extended by the contract of pledge, and stood in the place of the noteholders, who had a right to purchase (see *Easton* vs. *German-American Bank*, 8 Sup. Ct. Rep., 1297, which also disposes of any question that might arise from a failure to sell for and actually collect money).

In *Richards* vs. *Holmes*, 18 *How.*, 143, above referred to, the Supreme Court of the United States held that it was no ground of objection to a sale under a power in a trust mortgage, that the person for whose benefit the mortgage was made became the purchaser at the sale, he being the highest bidder; and the Court refused to set aside the sale to him. A similar decision was made in *Smith* vs. *Black*, 115 U. S., 308.

In *French* vs. *Powers*, 120 N. Y., 128, Folger, *Ch. J.*, said (at p. 133): "It has been recently settled by this Court (Casserly *vs.* Witherbee, 119 N. Y., 522), that the purchase by the mortgagee of the mortgaged property on the foreclosure of his chattel mortgage *does not invalidate the foreclosure nor prevent him from acquiring a title freed from the mortgagor's right to redeem.*"

In *Lee* vs. *Fox*, 113 Ind., 98, 105, Mitchell, *C. J.*, says: "The sale is for the purpose of extinguishing the mortgagor's equity, and where the sale is fairly made at public auction in pursuance of a power the mortgagor's equity of redemption is effectually cut off, *even though the mortgagee be the purchaser.* A mortgagee of personal property is not within the rule which prohibits a trustee from purchasing at his own sale, provided he acts fairly."

See also *Goodell* vs. *Dewey*, 100 Ill., 308.

But even if the rule were otherwise, where the contract of pledge permits the pledgee or one for whose benefit the pledge was made, to purchase, the right will be recognized and enforced.

"It is usual in power of sale mortgages to authorize the mortgagee to purchase at a sale under the power, and when this is the case there is no objection to such purchase" (Jones Chattel Mortgages, 4th Ed., § 806).

Here the power was expressly given, with the knowledge and acquiescence of the intervenor's assignor, to the beneficiaries under the trust mortgage to designate a purchasing trustee, and in pursuance of that power they designated the pledgees to act as trustees to purchase for their benefit. This exercise of the power of sale and the right to purchase have not been attacked for fraud or unfairness, and under the decisions quoted above should be allowed to stand, without interference at this date from the intervenor, whose sole objection to the sale when made *was his alleged* PRIORITY *of lien.*

No valid objection can be made to the manner of conducting the sale.

"Under the authority given to the defendant he had the right, on the non-performance of the plaintiff, to sell either certificate of stock or both, if the proceeds of the sale of one did not satisfy the debt, and was not bound to divide either certificate up into small lots, even if a prudent owner, having regard solely to his own interests, would have done so."

Newsome v. *Davis*, 133 Mass., 343.
Jones on Pledges, § 739.

The fact that bonds sold under foreclosure to satisfy a pledge were sold for a small sum only, does not affect the purchaser's title where no fraud is shown.

Wheelwright vs. *St. L., &c., Co.*, 56 Fed. Rep., 164.

But the sale is either valid and binding upon the defendant, or it is invalid, and the rights of the parties remain as if there were no sale. The appellant can-

not ratify the sale and then claim that defendants have failed to establish their plea to have been *bona fide* purchasers for value of the securities under the pledge because they have sold and transferred them away.

The effect of an unauthorized sale and purchase by the pledgee is to leave the property where it was.

Perry vs. *Birmingham Nat. Bk.*, 9 So. Rep. (Ala.), 299.
Day vs. *Holmes*, 103 Mass., 306.
Fay vs. *Gray*, 124 Mass., 500.
Stores vs. *Frazier*, 72 Ills., 428.
Jones on Pledges, § 741.
Bryan vs. *Baldwin*, 52 N. Y., 232.
Collins vs. *Riggs*, 14 Wall, 491.
Jones vs. *Van Doren*, 130 U. S., 684.
Cunningham vs. *R. R. Co.*, 156 U. S., 400.

If a pledgee himself, or by his agent, unlawfully, or without authority, purchase collaterals upon a sale for default, nothing passes by the sale, and the pledgee holds the pledge by his original title as pledgee.

Jones on Pledges, § 741.

Such a sale is however not void, but voidable at the election of the pledgor and those who succeed to his rights. They are at liberty to ratify the sale, in which case it would be valid for all purposes. If they elect not to do this and to consider the purchase by the pledgee illegal, this avoids the sale, and the parties are then remitted to their rights, *the same as though no sale had been attempted.*

Bryan vs. *Baldwin*, 52 N. Y., 232.

In *Bank of Old Dominion* vs. *D. & P. Railroad Co.*, 8 *Iowa*, 277, where a pledgee purchased without authority at an auction sale of the pledged property, it was decided that the pledgee held the

collateral under the original agreement, the purchase being invalid.

Appellant, however, claims that he has a right to redeem upon paying the amount paid at the auction sale, *i. e.*, $1,000,000. He would treat the sale as valid for the purpose of deriving an advantage from it, but as invalid in order to avoid the foreclosure of his right to redeem. He cannot maintain such position. He must affirm or disaffirm the sale *in toto*.

This is well settled where the pledgee is also, in effect, the purchaser (cases *supra*). And where the the purchaser is a stranger, redemption can only be had upon payment of the entire amount due on the debt, to secure which the property illegally sold was pledged.

Thus, in *Collins* vs. *Riggs*, 14 Wall., 491, the holder of a prior unrecorded deed brought suit in ejectment against the purchaser at a foreclosure sale, which, as the former claimed, had not foreclosed him. *The plaintiff had first offered to redeem by paying the purchase price, which was less than the mortgage debt.* The Court, by Bradley, *J.*, said: "To redeem property which has been sold under a "mortgage for less than the mortgage debt, it is not "sufficient to tender the amount of the sale. *The* "*whole mortgage debt must be tendered or paid* "*into court.* The party offering to redeem *pro-* "*ceeds upon the hypothesis that, as to him, the* "*mortgage has never been foreclosed and is still in* "*existence.* Therefore, he can only lift it by pay- "ing it."

Cited as settling law in

Jones v. *Van Doren*, 130 U. S., 684, 692, and *Cunningham* v. *Macon & Brunswick R. R.*, 156 U. S., 400-425;

c. f. *Jones on Mortgages*, Sec. 1669.

Pomeroy's Eq., Sec. 1220 *et seq.*

"In case of a rehypothecation the original contract of pledge not being destroyed, the pledgor can recover from the second pledgee the thing pledged only by paying to him the amount of debt due to the first pledgee."

Jones on Pledges, § 579.

If the pledgor comes into a court of equity he must do equity by first paying the debt secured and allowing for other set-offs.

18 *Am. & Eng. Ency. of Law*, 727.
See also *Tally* v. *Freedman's Savings, &c., Co.*, 93 U. S., 321,

where the doctrine is thoroughly discussed and all the cases reviewed. The failure of the pledgor in that case to pay or tender to a purchaser from his pledgee the entire amount due the pledgee was held fatal to his right to redeem, even though the sale was unauthorized and illegal.

18 *Am. & Eng. Ency. of Law*, p. 633, and Note 2.

So long as nothing is done which deprives the pledgor of his right to redeem on payment of the principal debt, he is not injured and cannot complain of the sale.

Chapman v. *Brooks*, 31 N. Y., 75.

A junior pledgee is in precisely the same position.

XI.

The appellant invokes the provisions of the Code of Iowa, Sec. 1628, to show that the delivery of the certificates of the Sioux City and Northern Stock to Tod & Co. without transfer on the books of the cor-

poration was ineffectual to vest them with complete title thereto as against the Union Loan and Trust Co.

The statute, which is similar to those in force in most of the States, is as follows:

> "The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, so as to show the name of the person by and to whom transferred, the numbers or other designation of the shares and the date of the transfer; but such transfer shall not in any way exempt the person making it from any liability of said corporation created prior thereto. The books of the company must be so kept as to show intelligently the original stockholders, their respective interests, the amount paid on their shares, and all transfers thereof; and such books, or a correct copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same."

It is however well settled that a delivery of the certificates with power to transfer is complete and binding *as between the parties*, and that *at least an equitable title passes to the grantee*, upon such delivery, even without transfer on the company's books.

And such transfer is good as against all the world except the corporation itself and attaching or execution creditors of the parties appearing as the stockholders on the books of the company, who acquire a lien by service upon the corporation before actual transfer of the stock, and without notice of the previous delivery of the stock certificates.

Hershire v. *1st Natl. Bank*, 35 Iowa, 272.

Courtright v. *Deeds*, 37 Iowa, 503.

Mooar v. *Walker*, 46 Iowa, 164.

Fort Madison Lumber Co. v. *Batavian Bank*, 71 Iowa, 270.

Nat'l Bank v. *Farmers' Bk.*, 82 Iowa, 192.

The effect of the decision in *Fort Madison Lumber Co.* vs. *Batavian Bank*, 71 Iowa, 270, cited by the

intervenor, is simply that all transfers of shares not entered on the books of the company are invalid *as to attaching or execution creditors of the assignors*, as well as to the corporation and *subsequent purchasers in good faith*, before transfer actually made on the books. The Court, Adams, *Ch. J.*, says: "This, at least, is the rule of the statute, "and must be followed, unless some equit- "able consideration controls. If the attaching "creditors of the transferer had knowledge of the "transfer, it may be that a court of equity would "protect the transferee's rights. It has frequently "been so held, but that question is not before us." And again, "There is no question in regard to the "preponderance of authority. It is clearly on the "side of the appellants. But we are not influenced "more by this fact than what seems to be the plain "language and intent of the statute, and the diffi- "culty and uncertainty which would often attend "securing debts by attachment of stock, if stock, *as* "*against attaching creditors*, can be transferred by "mere delivery of the certificates, and if the books "provided expressly for inspection by such creditors "are to serve especially the purpose of a false "scent."

Thus the Court, while construing the statute as a protection to attaching creditors, who would otherwise be betrayed by the false scent, expressly declares that in so deciding it is not influenced more than the case before it required.

The appellant does not claim under the Sioux City & Northern R. R., the corporation, nor as an attaching or execution creditor of the former record owners, and he does ask a court of equity to interfere in his behalf, so that this point resolves itself, in its best aspect for the intervenor, into a question of equities, and the strict legal requirements of the statute are therefore of no material importance.

As a question of *equities*, the statement of facts shows that during the interval of time between the

transfer of stock to the custody of Tod and the entry of the transfer on the books, neither the intervenor nor his assignee acquired any rights therein or placed any reliance thereon or were in anywise misled by a false scent, and that they were in nowise prejudiced by the delay in the transfer on the books, and have no equitable foundation for an attempt to profit by it.

The decision in *Moore* vs. *Marshalltown*, 81 Iowa, 45, amounts to no more than a determination that an execution creditor is entitled to the same rights as an attaching creditor as against a transferee whose transfer has not been entered.

In *Nat. Bk.* vs. *Farmers' Bank*, 82 Iowa, 192, it was held *in equity* that the purchaser of corporate stock at an execution sale, based on an attachment, which attachment was improperly levied, acquires no title as against one claiming under an assignment prior to the attachment, but not entered on the books of the company. The soundness of the decision in Ft. Madison Lumber Co. *vs.* Bank, *supra*, was vigorously assailed by appellants' counsel, and the authorities to the contrary are fully collated in their brief. Beck, *Ch. J.*, said: "If the "Farmers, & Traders' National Bank had acquired a "valid title under the attachment, judgment and "execution, we think Clark could not, under the "transfer to himself, defeat the title thus acquired "by the bank. But if its title fails, then Clark can "hold the stock, as there is no creditor or pur"chaser who can claim it, and the transfer is good "as between himself and McNeil and the Com"mercial National Bank, the parties thereto."

It thus appears that such a transfer is not void, and that a court of equity will sustain the title of the transferee as against a person purchasing at an execution sale under an attachment not properly levied.

It follows that, notwithstanding the statute, a court of equity in interpreting rights thereunder is

at liberty to do substantial justice where no statutory rights are acquired, by looking into and enforcing the equitable rights of the parties.

The equitable view of the rights of the parties is well presented in *Black* vs. *Zacharie*, 3 How., 483, where it was held that while the legal title to corporate stock does not pass under the laws of Louisiana until the transfer is completed as pointed out by those laws, the equitable title will pass if the assignment be sufficient to transfer it by the laws of the State where the assignor resides, and if the laws of the State where the corporation exists do not prohibit the assignment of equitable interests in stock.

In *Bridgewater Iron Co.* vs. *Lissberger*, 116 *U. S.*, 8, the Supreme Court, under a similar statute of Massachusetts, and notwithstanding decisions of the Massachusetts Courts that the statute inures to the benefit of attaching creditors without notice of the transfer, held that the unrecorded transfer is valid as against an attaching creditor with notice.

BUT HERE THE STOCK OF THE SIOUX CITY AND NORTHERN R. R. CO. PLEDGED TO TOD & CO. WAS ACTUALLY TRANSFERRED INTO THEIR NAMES ON THE BOOKS OF THE COMPANY ON SEPTEMBER 1, 1893, BEFORE ANY NOTICE TO THEM OF THE INTERVENOR'S CLAIM AND MORE THAN A MONTH BEFORE THE FILING OF HIS PETITION IN THIS CAUSE. THEY HAVE, THEREFORE, NOT ONLY PRIOR EQUITABLE, BUT AN ACTUAL LEGAL RIGHT TO THE SECURITIES.

XII.

Even assuming that the defendant and his beneficiaries had notice of the claims of the Union Loan & Trust Company; that the collaterals were originally pledged with the Union Loan & Trust

Co. to secure it against liability on railroad syndicate paper, and that the company had not voluntarily relinquished such prior right; the extinguishment of the original obligations for which the securities are alleged to have been pledged to the Trust Company as collateral, without the express reservation of the collateral as security for the payment of new notes, would give the defendants at least an *equal* equitable footing with the alleged prior pledgees, and a superior *legal* right *arising out of the actual possession of the securities;* and in that case the equities being equal, the law would prevail and the defendant's legal title and possession remain secure.

XIII.

The appellant recognizing that Tod & Co. as trustees under the million-dollar loan had a prior lien on the securities, which they released to acquire their present lien, insists that the transaction by which the prior lien was released is invalid, although it was with the proceeds of the disputed transaction that the prior lien was paid, and although possession of the securities has never been lost; he thus puts himself in the unamiable light of insisting upon the validity of a transaction to defeat a prior lien and upon its invalidity to establish a substituted lien in the same custody under an arrangement with the knowledge and consent of all interested parties that it should have that effect.

His contention that Tod & Co. have waived their lien under the million-dollar transaction while acquiring none under the one-and-a-half-million-dollar transaction is a violation of that fundamental equitable maxim that he who seeks equity must do equity. He would have this Court actually rob the careful man to protect the careless.

But the maxim of equity is "*Vigilantibus non dormientibus æquitas subvenit.*"

As to the contention that the Bridge Co.'s notes were accommodation paper, we deny that; but in any event, Tod & Co. acquired possession of the securities, and the Union Debenture Company and the purchasers of the notes advanced their money upon a contract of pledge, which it is not open to the intervenor by any known rule of law or equity to dispute.

The whole transaction between Garretson and Tod & Co. was strictly in the due course of business. We contend no transaction can be imagined which would be more so.

The circumstances upon which intervenor relies to establish the contrary, in Thompson *vs.* Sioux Falls Nat. Bk., 150 U. S., 231, are in nowise similar or analogous to those now under consideration, and tested by the definitions of good faith collated in the appellant's brief, the conduct of J. Kennedy Tod & Co. was in absolute good faith.

Tod & Co. received these securities in the usual course of business, that course of business which authorizes any two men in the community to contract with each other for lawful objects on such terms as they may elect, and to part with their property to each other in good faith as and when they may choose. The appellant seeks to confine the usual course of business to those limits which confined it when choses in action were not assignable, and commerce consisted in the barter of products consumed in their use. That is now the usual course of business, in which by any lawful agreement between parties competent to act, one assumes obligations to the other contemplated by both, or parts for value with property of any description which he is empowered to transfer. Tod & Co. are chargeable only with ordinary caution and prudence under the circumstances of the case, and in fact they were extraordinarily cautious and prudent. The appellant would except from the

definition of lawful business, apparently, all transactions involving non-negotiable choses in action, and class them as unlawful and entitled to no protection from the courts, and deny the possibility of good faith in acquiring them.

The burden is not imposed upon a party to a contract to establish that it was a fair and equitable contract, and that no advantage was taken of the other party thereto in exacting it from him, even where the other party to the contract was at the time that it was made in a necessitous condition.

Carley vs. *Tod*, 83 *Hun* (S. Ct. of N. Y.), 53.

It must also be borne in mind that J. Kennedy Tod & Co. are not the actual parties in interest in this cause; they are but *trustees* for the holders of the Pacific Short Line Bridge notes, who have purchased the same and paid the amount thereof, and who have been prevented for four years from realizing on the security for their advances, upon the faith of which they parted with their money, by the claims of this appellant and those who sue in his name, who parted with their money without any security and without inquiry.

Even if Tod & Co., therefore, could be chargeable with notice of any prior claims on the securities, such notice is not necessarily imputable to the noteholders.

While it is a general rule that notice to a trustee is notice to the beneficiary, that rule is based upon the relation of principal and agent, and where such relation does not exist, and the trustee is really the agent and selection of the creator of the trust for securing the co-operation of innocent third persons —as was the case here—the rule does not apply.

Curtis vs. *Leavitt*, 15 N. Y.

Brooks vs. *Marbury*, 11 Wheat.

Commissioners v. *Thayer*, 94 U. S., 631.

XIV.

The defendants are in lawful possession and legal ownership of the securities in controversy. The stock has been duly transferred into their names upon the registry of the company pursuant to the statute. The stock and bonds were duly pledged to them in trust to secure the notes which were issued and sold amounting to $1,500,000, and the collateral was foreclosed in strict conformity to the agreement of pledge.

We have considered it an unprofitable waste of time to follow the counsel for the appellants through all the meandering allegations of fraud and misconduct in their brief. We have endeavored to formulate a clear summary of the evidence in the cause and of the principles of law applicable to the only points of the contention against us which seem to demand any serious consideration. Reckless allegations as to conduct of parties and their counsel in briefs submitted for the consideration of serious tribunals usually react upon their authors, and we confidently submit both the substance and the manner of statement in the appellants' briefs in this case to the judgment of this Court.

In conclusion, we earnestly urge that these appellees acted in the utmost good faith in the transactions resulting in the loan to secure which the securities in controversy were pledged. The notes have been sold to parties who purchased them for value before maturity and in reliance upon the pledge of the securities under the trust agreement. They are attacked by a horde of hungry creditors of the Union Loan and Trust Company, who advanced their money in blind confidence, without security and without inquiry. They have for four years been subjected to delay in the enforcement of their rights, their property burdened with the expense of a double receivership, and themselves subjected to the expense of a vexatious litigation.

They submit that they should now be firmly established in their rights, and the decree of the Circuit Court, in so far as it adjudges the prior lien of these defendants upon the securities in controversy, should be affirmed, and it should be adjudged that any right of redemption which the appellant might have had was completely barred and foreclosed by the sale of the securities at auction in 1893.

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